AT&T's advertising increased 85 percent between 1989 and 1992 to $1.6 billion.[178] We believe that these facts, along with the high churn rate among consumers, suggest that AT&T lacks the ability to raise its price unilaterally above competitive levels in the provision of long-distance residential services. We reject the argument that high advertising expenditures by long-distance carriers indicate a lack of competition. The fact that AT&T and its competitors advertise their discount plans, and not their basic schedule rates, demonstrates that advertising is not inconsistent with aggressive price competition. Similarly, that competing carriers' products are slightly differentiated is also not inconsistent with substantial competition, since the carrier may be designing calling plans to target specific groups of consumers.

65. We also find, consistent with the First Interexchange Competition Order, that business customers are highly demand-elastic. In that order, the Commission discussed in detail the high demand elasticities of business telecommunications users. Specifically, the Commission found that business customers "routinely request proposals from carriers other than AT&T and accord full consideration to these proposals."[179] Furthermore, we found that business users consider the offerings of AT&T's competitors to be similar in quality to AT&T's offerings.[180] Purchasers of business services, the Commission found, were also more sophisticated and knowledgeable about the products they buy and often make decisions based on advice from consultants and in-house telecommunications experts about the service offerings and prices that are available to them.[181] While TRA argues that in the resale context certain business customers prefer only an "AT&T product," despite the ability of AT&T's competitors to offer more competitive terms and conditions, this does not mean that AT&T has the ability to control price. In addition, evidence in the record indicates that in 1994, AT&T supplied only 25.6 percent of the approximately $4.4 billion in services that were resold, and that by 1996, AT&T will supply only 20.3 percent of the approximately $5.6 billion services that are resold.[182] Consequently, TRA's summary assertion is not sufficient to cause us to depart from our findings in the First Interexchange Competition Order. Accordingly, we affirm our findings in the First Interexchange Competition Order that business customers are highly demand-elastic. The willingness of business and residential customers to switch long-distance providers is evidence of a lack of market power on the part of AT&T.

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[178] AT&T Motion, Appendix A, Michael E. Porter, "Competition in the Long Distance Telecommunications Market," at 6-7 (1993).

[179] First Interexchange Competition Order, 6 FCC Rcd at 5887.

[180] Id.

[181] Id. at 5887-88.

[182] Ex Parte Presentation in Support of AT&T's Motion for Reclassification as a Non-dominant Carrier, CC Docket No. 79-252, filed August 19, 1995, at 5.

66. In concluding that residential and business customers are demand elastic, we do not discount the significance of AT&T's goodwill or consider it to be of no marketing value to AT&T. As the Commission stated in the First Interexchange Competition Order, "[i]n any market in which relatively new entrants compete against one or more established incumbents, goodwill is bound to play a role, in some cases a prominent role."[183] That does not mean, however, that AT&T has market power or that residential and business customers are demand inelastic. Particularly where business customers tend to be sophisticated and residential customers show high churn rates, the significance in the marketplace of name recognition and historic goodwill is reduced.

(c) Market Share

67. AT&T's steadily declining market share for long-distance services also supports the conclusion that AT&T lacks market power in the relevant market. At the time of the Competitive Carrier First Report and Order, AT&T had approximately 90 percent of the overall long-distance industry revenues. From 1984 to 1994, AT&T's market share, in terms of both revenues and minutes, fell from approximately 90 percent to 55.2 and 58.6 percent in terms of revenues and minutes respectively.[184]

68. Although several parties argue that AT&T's overall market share of 60 percent is inconsistent with a finding that AT&T lacks market power, we disagree. It is well-established that market share, by itself, is not the sole determining factor of whether a firm possesses market power. Other factors, such as demand and supply elasticities, conditions of entry and other market conditions, must be examined to determine whether a particular firm exercises market power in the relevant market.[185] As we noted in the First Interexchange

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[183] First Interexchange Competition Order, 6 FCC Rcd at 5888.

[184] See Appendix B, Figure 1. See also IAD 1995 Long Distance Market Share Report at 13.

[185] See United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974) (market share is imperfect measure because market must be examined in light of access to alternative supplies); United States v. Baker Hughes, Inc., 908 F.2d 981, 986 (D.C. Cir. 1990) (market share statistics "misleading" in a "volatile and shifting" market); United States v. Syufy Enterprises, 903 F.2d 659, 664-67 (9th Cir. 1990); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335-36 (7th Cir. 1986); Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221, 87-8, Further Notice of Proposed Rulemaking, 10 FCC Rcd 3524, 3535 (1995). See generally Phillip E. Areeda, Herbert Hovenkamp, & John L. Solow, IIA Antitrust Law: An Analysis of Antitrust Principles and Their Application 83-302 (1995) (discussing various factors considered in assessing market power).

Competition Order, "[m]arket share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities."[186]

69. Our determination fifteen years ago in the First Report and Order that AT&T possessed market power rested on several market characteristics, including the facts that AT&T controlled, through its ownership of the Bell Operating Companies, local access facilities for over 80 percent of the nation's phones, and that AT&T was virtually the only supplier of all interexchange services. While divestiture removed AT&T's control over local bottleneck facilities, the interstate, interexchange market was still in its infancy and therefore did not support a finding of non-dominance for AT&T.

70. Today, conditions in the market are far different. First, AT&T has not controlled local bottleneck facilities for over ten years. Second, AT&T faces at least two full-fledged facilities-based competitors. Both MCI and Sprint have nationwide networks that are capable of offering most consumers an alternative choice of services relative to AT&T. In addition, there is at least one other nationwide facilities-based provider (WorldCom, formerly LDDS/WilTel), which primarily serves the business market and could enter the residential market segment, and dozens of regional facilities-based carriers. There are also several hundred small carriers that primarily resell the capacity of the largest interexchange carriers. We believe that the significant excess capacity and large number of long-distance carriers limits any exercise of market power by AT&T.

71. Third, virtually all customers today, including resellers, have numerous choices of equal access carriers employing facilities or resale, or both. Equal access was mainly implemented by the local exchange carriers between 1984 and 1989. In 1984, equal access was not available. Major competitors such as MCI and Sprint did not have equal access in a majority of central offices until 1989. By 1994, equal access was available in 97 percent of the central offices, and was available to all long-distance carriers. Taken together, these changes in market conditions warrant our reconsideration and reevaluation of AT&T's classification.

72. The behavior of the market between 1984 and 1994 suggests intense rivalry among AT&T, MCI and Sprint. Moreover, we note that AT&T's market share fell approximately 33 percent between 1984 and 1994. The fact that the rate of decline of AT&T's market share has decreased during the last five years is not an indication of market power. Rather, it may simply reflect the fact that, since 1990, most customers, including resellers, have had dozens of choices of equal access carriers, and that AT&T's competitors no longer have the advantage of lower access costs that enabled them to underprice AT&T and capture market share. Accordingly, we find the decline in AT&T's market share suggests that AT&T no longer possesses market power.

[186] First Interexchange Competition Order, 6 FCC Rcd at 5890.

(d) AT&T's Cost Structure, Size, and Resources

73. Several parties claim that AT&T retains market power simply by virtue of its lower costs, sheer size, superior resources, financial strength, and technical capabilities. We do not find that these advantages, by themselves, confer market power on AT&T. As we observed in the Interexchange Competition proceeding, the issue is not whether AT&T has advantages, but "whether any such advantages are so great to preclude the effective functioning of a competitive market."[187] It is not surprising that an incumbent would enjoy certain advantages, including resource advantages, scale economies, long-term relationships with suppliers (including collocation agreements), and ready access to capital. Such advantages, however, do not a fortiori indicate that AT&T has a lower cost structure that can give it an unfair competitive advantage over its competitors. As we discussed in the First Interexchange Competition Order, in comparing cost structures of competing carriers, it is not enough simply to look at access or transport costs. The fact that "AT&T may pay lower transport charges than a competitor in a particular LATA . . . does not mean that its overall transport cost structure is lower than those of its competitors."[188] Moreover, such advantages, if they do exist, do not indicate that AT&T has the ability to control price. Volume and term discounts, for example, are expressly permitted by the Commission so that firms can take advantage of their size. That AT&T is in a position to obtain volume and term discounts from CAPs and LECs does not necessarily confer market power on AT&T. Indeed, there is no evidence that the advantages enjoyed by AT&T with regard to volume and term discounts give AT&T the power to sustain prices profitably above the competitive level. As we noted in the First Interexchange Competition Order, the "competitive process itself is largely about trying to develop one's own advantages, and all firms need not be equal in all respects for this process to work."[189] Nothing in the record in this proceeding demonstrates otherwise. Accordingly, we do not find that AT&T's size or cost structure constitutes persuasive evidence of market power.

b. Specific AT&T Service Groupings

74. As we have stated above, AT&T's ability to control the price of individual services within the overall relevant market is not the determining factor in assessing AT&T's dominance in the interstate, domestic, interexchange market. Nonetheless, a number of parties on the record have raised arguments regarding AT&T's alleged market power with respect to specific services. Accordingly, we now examine AT&T's provision of a number of individual services, to assess their effect on AT&T's overall market power.

[187] First Interexchange Competition Order, 6 FCC Rcd at 5891-92.

[188] Id. at 5890.

[189] Id. at 5892.

(1) Residential Services Pricing

(a) Pleadings

75. Several commenters have argued that trends in prices since 1990 indicate that residential services have not become more competitive and that they may have become less competitive.[190] The Joint Bell Companies claim that there has been a steady upward price trend since 1990 "based on the average price per minute for basic service,"[191] and that AT&T, MCI and Sprint have engaged in "lock-step" pricing with six increases in three years.[192] IDCMA asserts that, since AT&T first filed its motion, AT&T has continued to increase prices.[193] Considering both basic rates and discounts, the Joint Bell Companies argue that price-cost margins have risen since 1990, which they claim is indicative of a reduction in competition.[194] In a similar analysis, they claim that AT&T's gross margins (defined as net sales less cost of goods sold divided by net sales) increased between 1984 and 1994.[195] They claim that this increase in profitability is reflected in an increase in AT&T's earnings per share over the same time period.[196] The Joint Bell Companies further argue that AT&T's actual residential price index (API) remained close to or at the Basket 1 price cap index (PCI) over the four years following the imposition of price caps, despite the fact that AT&T's productivity savings exceeded its X-factor, and that MCI and Sprint immediately matched any AT&T increase in residential prices.[197] This, they assert, demonstrates both that AT&T has market power and that residential services exhibited oligopolistic collusion.[198] Finally, as evidence of the lack of competition among AT&T, MCI, and Sprint, the Joint Bell Companies claim that announcements by AT&T of price increases leads to increases in the stock price not only of AT&T, but also of MCI and Sprint.[199]

76. AT&T acknowledges that basic rates have increased, but contends that, after accounting for discounts, AT&T's average revenue per minute, in nominal terms, has decreased.[200] AT&T also claims that the lock-step increases in basic rates are due to the fact that Basket 1 price caps keep prices below cost to low volume customers,[201] and that asymmetric regulation of AT&T creates the artifact of price leadership for basic rates.[202] CSE also asserts that alternative reasons exist for similarity in price changes for AT&T, MCI, and Sprint.[203] CSE notes that AT&T raised its rates after companies nationwide adopted accrual accounting for various retirement benefits.[204] While MCI and Sprint followed suit and increased prices, CSE argues that this makes sense if these companies also

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[190] Joint Bell Companies June 9, 1995 Comments at 8, Attachment B, Reply Affidavit of Paul W. MacAvoy, at figures 14-16; TFG June 9, 1995 Comments at 6; IDCMA June 9, 1995 Comments at 7; TRA June 9, 1995 Comments at 13; LBC Joint Commenters June 9, 1995 Comments at 9.

[191] Joint Bell Companies June 9, 1995 Comments, Attachment D, Reply Affidavit of Jerry A. Hausman, at Figure 1; see also TFG June 9, 1995 Comments at 6.

[192] Joint Bell Companies June 9, 1995 Comments at 8; see also TFG June 9, 1995 Comments at 6.

[193] IDCMA June 9, 1995 Comments at 7.

[194] Joint Bell Companies June 9, 1995 Comments, Attachment B, Reply Affidavit of Paul W. MacAvoy at Figures 14-16.

[195] Id., Attachment E, William E. Taylor and J. Douglas Zona, "An Analysis of the State of Competition in Long Distance Telephone Markets," at 15; see also TRA June 9, 1995 Comments at 13; LBC Joint Commenters June 9, 1995 Comments at 7.

[196] Joint Bell Companies June 9, 1995 Comments, Attachment E, William E. Taylor and J. Douglas Zona, "An Analysis of the State of Competition in Long Distance Telephone Markets," at 42.

[197] Taylor and Zona further assert that they were unable to find strong evidence of productivity growth by AT&T. They claim that this was because there was insufficient competition to force AT&T to improve productivity. Joint Bell Companies June 9, 1995 Comments, Attachment E, William E. Taylor and J. Douglas Zona, "An Analysis of the State of Competition in Long Distance Telephone Markets," at 34-35.

[198] Id., Attachment C, Affidavit of Jerry A. Hausman, at 12-17.

[199] Joint Bell Companies June 9, 1995 Comments, Attachment A, Affidavit of Paul MacAvoy at 30-31.

[200] AT&T December 3, 1993 Reply Comments at 31; see also AT&T June 30, 1995 Reply Comments, Attachment 1, John Haring, Jeffrey H. Rohlfs and Harry M. Shooshan III, "Disabilities of Continued Asymmetric Regulation of AT&T," at Table I (domestic revenue per conversation minute declined from \$0.17760 in 1991 to \$0.16156 in 1994).

[201] AT&T April 24,1995 Ex Parte Filing, Attachment G, Affidavit of B. Douglas Bernheim and Robert D. Willig at 149; see also CSE June 9, 1995 Comments at 5.

[202] AT&T April 24,1995 Ex Parte Filing, Attachment G, Affidavit of B. Douglas Bernheim and Robert D. Willig at 150-151.

[203] CSE June 9, 1995 Comments at 4.

[204] Id.

changed their accounting method.[205] With respect to the increase in the price-cost margin, AT&T argues that it should be expected that prices would be above marginal cost in a market with high fixed costs.[206] AT&T further claims that, between 1991 and 1994, its average revenue per minute decreased faster than did the average per-minute cost of interstate switched access service.[207] AT&T contends that this comparison shows that overall, its prices have declined by more than the amount of the access charge reductions implemented by the local exchange carriers during this period.

77. The LEC Joint Commenters note, however, that many discount plans are not offered ubiquitously, forcing customers in some rural areas to pay the higher basic rate.[208]

(b) Discussion

78. AT&T's pricing of residential services also supports our conclusion that AT&T lacks market power. Our analysis of the record indicates that, between 1991 and 1995, AT&T's best available discounted residential rates for customers with monthly bills over $10.00 fell between 15 and 28 percent, in nominal terms, depending on usage patterns.[209] The record also indicates that MCI and Sprint frequently initiate new discount plans and that AT&T responds.[210]

79. In addition, it appears that an increasing percentage of AT&T's residential customers are selecting discount plans rather than paying AT&T's basic rates. Although the record does not indicate the exact number of AT&T's residential customers who are on discount plans, the Commission has previously noted that, in 1993, discount plans accounted for 33 percent of Basket 1 traffic, while in 1994, calls under AT&T's True Promotions plans

[205] Id.

[206] Id. at 161.

[207] AT&T June 30, 1995 Reply Comments, Attachment 1, John Haring, Jeffrey H. Rohlfs and Harry M. Shooshan III, "Disabilities of Continued Asymmetric Regulation of AT&T," at 26 (AT&T June 30, 1995 Reply Comments, Haring, Rohlfs and Shooshan Attachment).

[208] LEC Joint Commenters June 9, 1995 Comments at 5.

[209] See Appendix B, Table 1.

[210] AT&T April 24, 1995 Ex Parte Filing, Attachment G, Affidavit of B. Douglas Bernheim and Robert D. Willig at 140-41.

accounted for 53 percent of Basket 1 traffic.[211] The size of this increase strongly suggests that the number of customers on discount plans has increased. With respect to the conflicting evidence over whether or not all access cost reductions were passed through to consumers, we find that AT&T presented the only study that specifically isolated domestic interstate revenues. It found that, between January 1991 and December 1994, the total reduction in AT&T's rates exceeded the total reduction in access charges.[212] Further, Taylor and Zona's argument that AT&T's earnings per share increase demonstrates that AT&T has market power is inconclusive for the domestic interstate market, since earnings per share includes profits for all of AT&T's services and products, including equipment sales.

80. Both the decrease in prices for discount plans and the increasing number of customers choosing discount plans over basic residential rates strongly suggest that AT&T unilaterally cannot raise and sustain prices profitably above a competitive level for residential services. That MCI and Sprint often lead in offering promotional discounts is further evidence of the rivalry among the three largest interexchange carriers and of AT&T's lack of market power.

81. We note that concerns expressed about recent increases in basic schedule interstate long distance rates are not based on claims that AT&T has the power unilaterally to raise prices for this service. Rather, the commenters assert that AT&T, MCI and Sprint have coordinated their price changes and that AT&T is the price leader.[213] We acknowledge that the record demonstrates that, since 1991, basic schedule rates for domestic residential service have risen approximately sixteen percent (in nominal terms), with much of the increase occurring since January 1, 1994.[214] Moreover, each time AT&T has increased its basic rate, MCI and Sprint have quickly thereafter matched the increase.[215] In addition,

[211] Policy and Rules Concerning Rates for Dominant Carriers, Revisions to Price Cap Rules for AT&T, CC Docket Nos. 87-313, 93-197, Further Notice of Proposed Rulemaking, 10 FCC Rcd 7854, 7858 (1995).

[212] See AT&T June 30, 1995 Reply Comments, Haring, Rohlfs and Shooshan Attachment at Table 1.

[213] Sprint November 12, 1993 Comments at 8-9; TRA November 12, 1993 Comments at 8-10; WilTel November 12, 1993 Comments at 8-10; Joint Bell Companies June 9, 1995 Comments at 8; TFG June 9, 1995 Comments at 6.

[214] This percentage was calculated by comparing total bills paid by each of 60 customer profiles contained in the Joint Bell Companies June 9, 1995 Comments, Attachment B, Reply Affidavit of Paul W. MacAvoy, Appendix B at 6-8, 10-12, under January 1, 1991 basic schedule rates and July 6, 1995 basic schedule rates.

[215] Joint Bell Companies June 9, 1995 Comments, Attachment D, Reply Affidavit of Jerry A. Hausman at Figure 1; see also TFG June 9, 1995 Comments at 6.

studies in the record, including one submitted on behalf of AT&T, suggest that, if price cap regulation is removed for *Basket 1* services, basic residential rates will rise even further.[216]

82. AT&T maintains that lock-step increases in basic residential rates occur because these rates are below cost for low-volume users (i.e., those customers who spend between zero and $3.00 per month in long-distance calls).[217] We believe that, to the extent price caps have kept basic schedule rates below cost, an increase in basic schedule rates is not inconsistent with finding that AT&T lacks the power to control price. In addition, we are not persuaded by the Joint Bell Companies' argument that AT&T has individual market power based on the fact that AT&T's API has remained close to the PCI over a four-year period. As the Joint Bell Companies concede, each time that AT&T raised its basic rates, MCI and Sprint quickly matched the increase. Thus, to the extent that prices would rise if the Basket 1 price cap were removed, this is not evidence of AT&T's individual market power, but perhaps of tacit price coordination. In addition, we note that the Basket 1 API has been below the PCI by at least one percentage point for approximately 12 of the 14 months since August 1994.[218] Further, beginning in early 1995, the Basket 1 API began to drop steadily below the PCI, and that the API is currently 6.2 percent below the PCI.[219] To the extent this trend continues, this would appear to undercut the Joint Bell Companies' argument. Similarly, Dean MacAvoy's argument that AT&T has raised basic rates between 1991 and 1994 and that such price increases lead to the increase in the value of AT&T, MCI, and Sprint stock is not evidence that AT&T possesses unilateral market power. At most, it suggests that there may be tacit price coordination among AT&T, MCI and Sprint.

83. We find that the evidence in the record is conflicting and inconclusive as to the issue of tacit price coordination among AT&T, MCI, and Sprint with respect to basic schedule rates or residential rates in general. For example, as noted, certain evidence shows that the lock-step increases may be due to the fact that price caps have kept basic schedule rates below cost, and that any price leadership by AT&T is a function of the current asymmetric regulatory scheme.[220] To the extent, however, that tacit price coordination may

[216] See, e.g., AT&T April 24, 1995 Ex Parte Filing, Attachment G, Affidavit of B. Douglas Bernheim and Robert D. Willig at 139.

[217] AT&T April 24, 1995 Ex Parte Filing at 51.

[218] Based on information contained in AT&T tariff transmittals filed since August 1994.

[219] See AT&T Transmittal No. 9169, dated October 11, 1995, Letter from Mary Peterson, Administrator - Rates and Tariffs, AT&T Corp., to Secretary, Federal Communications Commission, Attachment A, at 2.

[220] AT&T April 24,1995 Ex Parte Filing, Attachment G, Affidavit of B. Douglas Bernheim and Robert D. Willig at 137-140; see also CSE June 9, 1995 Comments at 5.

be occurring, the Commission would view this as a matter of serious concern. We believe, however, that this problem, to the extent it may exist, is a problem generic to the interexchange industry and not specific to AT&T. We thus believe these concerns are better addressed by removing regulatory requirements that may facilitate such conduct, such as the longer advance notice period currently applicable only to AT&T, and by addressing the potential issues raised by these concerns in the context of the proceeding we intend to initiate to examine the interstate, domestic, interexchange market as a whole. Because they relate to the industry as a whole, these issues do not preclude our concluding that AT&T lacks the power to raise residential prices unilaterally above competitive levels. Thus, the evidence regarding residential pricing supports our finding that AT&T lacks market power.

84. Finally, we recognize that increases in AT&T's basic residential rates may occur.[221] While not relevant to our determination of whether AT&T meets our definition of non-dominance, we note that AT&T has voluntarily committed to institute two optional calling plans designed to mitigate the impact of such rate increases.[222] Under the plan for low-income customers, AT&T will offer for three years a calling plan that allows low-income residential customers to place one hour of interstate direct dial service at a rate frozen at 15 percent below current basic schedule rates.[223] These customers also may enroll in AT&T's other discount programs.[224] Qualification criteria for customers on this plan will be those established by state public utility commissions for implementing the Commission's Lifeline and Link-up programs.[225] AT&T will extend this offer to customers who participate in the state aid program used to determine qualification in the Lifeline or Link-up in that

[221] We note, however, that simply because basic schedule rates may rise in a competitive market does not mean that they will be unreasonable under Section 201 of the Communications Act.

[222] AT&T September 21, 1995 Ex Parte Letter, at 2-3.

[223] Id. at 2.

[224] Id.

[225] Id. For the Commission's *Lifeline* and Link-up programs, see MTS and WATS Market Structure: Amendment of Parts 67 and 69 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 50 Fed. Reg. 939 (1985); MTS and WATS Market Structure: Amendment of Parts 67 and 69 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 51 Fed. Reg. 1371 (1986); MTS and WATS Market Structure: Amendment of Parts 67 and 69 of the Commission's Rules and Establishment of a Joint Board, Report and Order, 2 FCC Rcd 2953 (1987). See also IAD 1995 Long Distance Market Share Report at 48-76.

state, to areas in a state not currently covered by an approved Lifeline or Link-up plan.[226] This plan should ameliorate any potential "rate shock" for low-income customers.

85. AT&T also has voluntarily committed to offer an optional plan that would be targeted to serve low-volume residential customers but that will be available to all.[227] AT&T will offer for three years an interstate direct dial service for low-volume residential consumers that allows them to purchase calling at guaranteed rates. For the first year, callers will pay $3.00 per month for the initial 20 minutes at any time during the day, and calling in excess of the first 20 minutes will be priced on a postalized basis at the rate of $0.25 per minute for peak (Day period) calling and $0.15 per minute for off-peak (Evening and Night/Weekend period) calling.[228] During the second year, the service will be priced at $3.00 for the initial 20 minute period and no higher than $0.27 per minute for peak and $0.16 per minute for off-peak overtime calling. During the third year, the service will be priced no higher than $3.25 for the initial 20 minute period and no higher than $0.27 per minute for peak calling and $0.16 per minute for off-peak overtime calling.[229] AT&T will notify its customers of the availability of these plans through a bill message every third month when their usage in that month is below $10.[230] In addition, AT&T will develop a consumer outreach program that will include, among other things, the following: (i) AT&T will implement a national and local public information program notifying the public of the availability of these offers; (ii) AT&T will inform the consumer advocates participating on the AT&T Consumer Panel and other national and local consumer groups of the availability of these offers; (iii) AT&T will train its customer service representatives on the provisions of these offers and insure their understanding of the application of these offers to a customer's particular calling pattern.[231]

[226] AT&T September 21, 1995 Ex Parte Letter at 2. Customers in those areas may enroll in this offer by demonstrating their participation in that state aid program. The State of Delaware currently does not participate in either Lifeline or Link-up. Therefore, AT&T will qualify Delaware customers for this offer based on their participation in a public assistance program identified in consultation with the Delaware Public Utility Commission. Id.

[227] Id.

[228] Id.

[229] Id.

[230] Id. at 2.

[231] Id., as clarified by AT&T October 5, 1995 Ex Parte Letter at 1; see also Wallman October 4, 1995 Letter at 1-2.

86. AT&T further has committed to file changes to its average residential interstate direct dial services on not less than five business days' notice, if those changes: (1) increase rates more than 20 percent in a single year for customers making greater than $2.50 in calls per month; or (2) increase the average monthly charges more than $.50 per month in a single year for customers making less than $2.50 in calls per month.[232] This determination will be made on the basis of average per minute charges separately for the Day, Evening and Night/Weekend time periods and determining the impact on customers of the proposed change by comparing the existing and proposed price over all minutes of use levels.[233] Such tariff transmittals will be clearly identified as affecting the provisions of this commitment.[234] While we believe the risk of losing significant market share to its competitors will effectively deter AT&T from proposing such rate changes, we note that the Commission has authority to defer the effective date of such changes for the maximum statutory period of 120 days and to suspend the charges for the full five-month period in order to conduct a full investigation if AT&T were to propose such increases. In addition, AT&T has committed to offer for a period of three years an interstate optional calling plan that will provide residential consumers a postalized rate of no more than $0.35 per minute for peak calling and $0.21 per minute for off-peak.[235]

87. With respect to these plans, AT&T states that, in the event of significant change in the structure of the interexchange industry including a significant reprice or restructure of access rates, AT&T may file tariff changes to these plans on not less than five business days' notice.[236] We note that, in considering the effects of such changes on AT&T's

[232] AT&T September 21, 1995 Ex Parte Letter at 2-3, as clarified by AT&T October 5, 1995 Ex Parte Letter at 1; see also Wallman October 4, 1995 Letter at 2-3. The 20 percent and $0.50 commitments will apply on a cumulative basis in a calendar year. AT&T October 5, 1995 Ex Parte Letter at 1.

[233] AT&T September 21, 1995 Ex Parte Letter at 3. AT&T will calculate a separate weighted average of rates for all mileage bands (weighted by the relative number of minutes for each mileage band) for the Day time period, the Evening time period, and the Night/Weekend time period. AT&T will calculate the impact of a rate change on a one-minute-per-month Day caller, a two-minute-per-month Day caller, a three-minute-per-month Day caller, etc., and will perform similar calculations for a hypothetical caller who called only during the Evening hours and a hypothetical caller who called only during the Night/Weekend hours. AT&T October 5, 1995 Ex Parte Letter at 1; see also Wallman October 4, 1995 Letter at 2-3.

[234] AT&T September 21, 1995 Ex Parte Letter at 3.

[235] Id.

[236] Id. at 3. Such tariff transmittals will be clearly identified as affecting the provisions of this commitment. Id.

commitment to the postalized rate, we will take into account the fact that $0.35 per minute for peak calling and $0.21 per minute for off-peak are greater than the current basic schedule rates. AT&T further states that this commitment does not apply to services provided via access service obtained from a new entrant to a local access market, unless those access rates are comparable to those charged by the incumbent local exchange access provider.[237]

(2) Business and 800 Services

(a) Discussion

88. AT&T incorporated its pleadings from the Interexchange Competition proceeding into its motion requesting reclassification as a non-dominant carrier.[238] As noted above, the Commission in the Interexchange Competition proceeding found that business services (except analog private line) and 800 services (except for 800 directory assistance) had become "substantially competitive" and, accordingly, streamlined its regulation of those AT&T services.[239] In January 1995, the Commission issued an order that streamlined the regulation of AT&T's commercial services for small business customers after finding that AT&T lacked market power with respect to these services.[240]

89. After reviewing the record established in the Interexchange Competition proceeding and our orders where we found business services to be substantially competitive, we find that the facts that supported our finding of substantial competition also support a finding that AT&T lacks market power with respect to these streamlined services.[241] In addition, we note that, in the 1995 AT&T Price Cap Order, we specifically found that AT&T lacks market power with respect to commercial services for small businesses.[242]

(3) Operator Services and Calling Cards

(a) Pleadings

90. AT&T asserts that effective competition exists for all services which comprise the interstate, domestic, interexchange market, and that the evidence in the record with regard to operator services justifies classifying AT&T as a non-dominant carrier.[243] Citing numerous technological, marketplace, legal and regulatory factors, AT&T asserts that "[e]very aspect of service in this segment is subject to vigorous competition," and that AT&T's market share of calling card services fell from over 75 percent in 1986 to about 64 percent in 1994.[244] AT&T further asserts that with respect to operator-handled calls, competition reduced AT&T's share by nearly 10 percent from 1993 through 1994.[245]

91. Several commenters dispute AT&T's assertions and contend that AT&T remains dominant in the operator services market segment.[246] These commenters argue that AT&T retains a significant majority of the operator services market segment,[247] that AT&T has proprietary calling cards and billing and collection arrangements with LECs that provide it with an unfair competitive advantage,[248] and that any change in AT&T's dominant carrier

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[237] Id.

[238] AT&T Motion at 14 n.43.

[239] First Interexchange Competition Order, 6 FCC Rcd at 5881-82, 5887, 5911; Second Interexchange Competition Order, 8 FCC Rcd at 3669, 3671.

[240] 1995 AT&T Price Cap Order, 10 FCC Rcd at 3014-20.

[241] In concluding that business services had become substantially competitive, the Commission relied on its finding that the business services marketplace is characterized by substantial demand and supply elasticities that limit AT&T's ability to control price of business services, on AT&T's pricing of business services under price cap regulation, and on AT&T's market share in business services. First Interexchange Competition Order, 6 FCC Rcd at 5887-89. The Commission also relied on its findings that AT&T does not enjoy overall cost advantages over its competitors, nor advantages due to AT&T's size and resources that are so great as to preclude the effective functioning of the business services market. Id. at 5890-92. The Commission found that 800 services had become substantially competitive based (continued...)

[241](...continued)
on the introduction of 800 number portability. Second Interexchange Competition Order, 8 FCC Rcd at 3669.

[242] Id. at 3027.

[243] AT&T Motion at 12, 13.

[244] AT&T April 24, 1995 Ex Parte Filing at 27.

[245] Id.

[246] CNS November 12, 1993 Comments at 9-10; PhoneTel November 12, 1993 Comments at 2, 10; Sprint June 30, 1995 Reply Comments at 2, 4; MCI June 9, 1995 Comments at 1-2, 11; CompTel June 9, 1995 Comments at 14; Oncor June 9, 1995 Comments at 1; MCI November 12, 1993 Comments at 8, n.17.

[247] CNS November 12, 1993 Comments at 9-10; PhoneTel November 12, 1993 Comments at 9.

[248] CNS November 12, 1993 Comments at 10-15, 13 n.13; MCI June 9, 1995 Comments (continued...)

status should be deferred pending resolution of other relevant regulatory proceedings.[249] More specifically, CNS cites its previous argument from the 1991 Interexchange Competition proceeding that AT&T retains as much as 90 percent of interexchange operator services.[250] Other commenters suggest other market share estimates of 64 percent[251] and 65 percent or more.[252] PhoneTel also argues that as of November 1993, no studies indicate a significant reduction of AT&T's market dominance.[253]

92. These and other commenters argue that AT&T has exploited its market dominance by introducing proprietary card issuer identifier (CIID) calling cards and has persuaded millions of AT&T and LEC calling card holders to shift to CIID cards.[254] Oncor claims that it and other non-dominant competitors must often react to the market pressures created by AT&T's CIID cards in ways, such as by increasing rates, that result in increased dominance by AT&T.[255] MCI claims that AT&T's CIID cards have enabled it to coerce premise owners into presubscribing their payphones to AT&T because AT&T can validate both LEC and its own calling cards while competitors cannot validate the millions of AT&T proprietary CIID cards.[256] Oncor notes that AT&T currently is the presubscribed long-distance carrier for 65 percent or more of public phone locations.[257] CNS and others claim that AT&T has used anticompetitive calling card strategies to harm other operator services providers (OSPs) for which the Commission formally admonished AT&T.[258] CNS further argues that AT&T has billing and collection agreements with independent LECs that are often unavailable, or are available at less favorable terms, to other interexchange carriers.[259]

93. Sprint argues that, before the Commission grants AT&T's motion, it must remove the remaining barriers to entry to operator services.[260] Sprint suggests that this

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[248](...continued)
at 11; CompTel June 9, 1995 Comments at 2, 13-14; Oncor June 9, 1995 Comments at 3; MCI November 12, 1993 Comments at 8 n.17.

[249] PhoneTel November 12, 1993 Comments at 9-10; Sprint June 30, 1995 Reply Comments at 3; MCI June 9, 1995 Comments at 12; MCI November 12, 1993 Comments at 9.

[250] CNS November 12, 1993 Comments at 9-10 (citing First Interexchange Competition Order, 6 FCC Rcd at 5906). See also PhoneTel November 12, 1993 Comments at 9.

[251] CompTel June 9, 1995 Comments at 13.

[252] Oncor June 9, 1995 Comments at 2.

[253] PhoneTel November 12, 1993 Comments at 9.

[254] Id. at 6; see also CNS November 12, 1993 Comments at 12; Oncor June 9, 1995 Comments at 2-3; CompTel June 9, 1995 Comments at 2, 13-14. "Proprietary" calling cards are calling cards that can be validated only by the carrier issuing the card or by other carriers the card issuer specifically allows to access validation and billing information. Billed Party Preference for 0+ InterLATA Calls, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 7714, 7715 (1992) (BPP Phase One Order). The card issuer identifier format (CIID format) is a format for the numbering of calling cards developed by Bell Communications Research Inc. (Bellcore). The CIID format, which is available only to card-issuing interexchange carriers, utilizes a six-digit card issuer identification number assigned by Bellcore, plus a four-digit account number and a four-digit PIN number assigned by the card issuer. The six-digit CIID number allows other carriers to identify the interexchange carrier that issued the card. The CIID format was developed to enable all interexchange carriers to issue fourteen-digit calling cards in a format which the BOCs could recognize and validate for intraLATA 0+ calls. Id. at 7715 n.6.
(continued...)

[254](...continued)

The LECs issue non-proprietary calling cards. In 1991, 29 percent of the industry's calling card minutes of use were billed to the non-proprietary LEC calling cards, where all customers are presubscribed to AT&T. AT&T's proprietary CIID cards represented approximately 35 percent of the market in 1991. AT&T September 8, 1995 ex parte letter from Charles L. Ward, Government Affairs Director, to William F. Caton, Acting Secretary, Federal Communications Commission, at Attachment 2. AT&T's advantage in securing payphone subscribers arises from the fact that AT&T can validate 0+ calls from all LEC cards and all AT&T CIID cards (over 60 percent of all calling cards), while competitors can only validate LEC cards and their own cards. AT&T can thus represent to payphone owners that it can complete a greater percentage of 0+ calls, from which the payphone owner receives a commission, than can its competitors.

[255] Oncor June 9, 1995 Comments at 3.

[256] MCI June 9, 1995 Comments at 11.

[257] Oncor June 9, 1995 Comments at 2.

[258] CNS November 12, 1993 Comments at 13-14 (citing Letter from Donna Searcy, Secretary, Federal Communications Commission, to Robert E. Allen, AT&T, 7 FCC Rcd 7529, 7530 (1992) (Admonishment Letter)); PhoneTel November 12, 1993 Comments at 6, 8; Oncor June 9, 1995 Comments at 3.

[259] CNS November 12, 1993 Comments at 16.

[260] Sprint June 9, 1995 Comments at 1.

objective can be accomplished by adopting a billed party preference system.[261] CNS and Oncor, however, assert that adoption of billed party preference would further strengthen AT&T's already dominant position.[262] PhoneTel, Sprint, and MCI argue that any change in AT&T's dominant carrier status in the operator services market segment should await resolution of the billed party preference proceeding.[263]

94. AT&T disputes the assertions that AT&T's proprietary calling cards and billing and collection arrangements provide it with an unfair competitive advantage.[264] It argues that the Commission has found proprietary cards actually promote customer choice.[265] AT&T further argues that its competitors have admitted that intense competition exists in long-distance today with numerous customer choices for all services.[266] AT&T maintains that competition in operator services, just as in all other interexchange services, has been fostered by technological advances, marketplace forces, and regulatory and legal actions.[267] In particular, AT&T notes that the Commission has adopted measures so that callers may use

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[261] Id. Sprint June 30, 1995 Reply Comments at 3; see also MCI June 9, 1995 Comments at 11-12 (arguing that a billed party preference system will reduce AT&T's market power in the 0+ payphones).

[262] CNS November 12, 1993 Comments at 17-22; Oncor June 9, 1995 Comments at 3. CNS claims that billed party preference likely would force out of the OSP market those companies that focus primarily on operator services because independent OSPs often do not offer substantial "1+" services or calling cards and therefore -- unlike AT&T, MCI and Sprint -- would not be able to rely on an entrenched base of existing presubscribed "1+" customers to presubscribe to their "0+" services. CNS also contends that the cost of purchasing billing name and address information from the LECs and the cost of rendering its own bills, likely would exceed revenues which would be received by an OSP for the services rendered an individual user. CNS November 12, 1993 Comments at 17-22. Oncor claims that billed party preference would be so prohibitively expensive for smaller competitors to implement that it would destroy the "0+" market. Oncor June 9, 1995 Comments at 3.

[263] PhoneTel November 12, 1993 Comments at 9-10; Sprint June 30, 1995 Reply Comments at 3; MCI June 9, 1995 Comments at 12; MCI November 12, 1993 Comments at 9.

[264] AT&T December 3, 1993 Reply Comments at 20.

[265] Id. at 21 (citing BPP Phase One Order, 7 FCC Rcd at 7719).

[266] AT&T June 30, 1995 Reply Comments at 10; AT&T April 24, 1995 Ex Parte Filing at 19-20.

[267] AT&T April 24, 1995 Ex Parte Filing at 28.

access codes to reach the carrier of their choice for operator service calls, regardless of the carrier to which the phone is presubscribed.[268] In addition, AT&T asserts that the Commission now requires that all interexchange carriers be given the same access to billing and validation data for LEC calling cards as is provided to AT&T.[269]

(b) Discussion

95. There is evidence in the record that AT&T's operator services face increasing competition from other OSPs and from providers of prepaid calling cards, and that AT&T's market share of operator services has declined significantly in recent years. The record also shows that AT&T's proprietary calling card may have given AT&T an advantage in obtaining payphone presubscriptions, but that AT&T's share of calling card minutes has not differed significantly from its share of total interstate minutes.[270] We conclude, based on this record, that AT&T's competitive position in the provision of calling card and other operator services does not create market power in the overall interstate, domestic, interexchange telecommunications market.

96. The commenters argue at length that AT&T's use of the proprietary CIID card gives it unfair competitive advantages.[271] We previously have found, however, that there are benefits associated with the use of proprietary cards, such as promoting the "important public interest of. . . consumer choice in the presubscription environment."[272] Pursuant to requirements adopted in Phase I of the Billed Party Preference proceeding, AT&T today "no longer market[s] its proprietary cards using a 0+ message" to gain a competitive advantage

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[268] Id. at 29 n.73.

[269] Id. at 28-29.

[270] AT&T September 6, 1995 ex parte submission from Charles L. Ward, Government Affairs Director.

[271] PhoneTel November 12, 1993 Comments at 6; CNS November 12, 1993 Comments at 12; Oncor June 9, 1995 Comments at 2-3; CompTel June 9, 1995 Comments at 2, 13-14.

[272] BPP Phase One Order, 7 FCC Rcd at 7719. We found that "[c]onsumers who want to use 0+ access without ever having to concern themselves with learning access codes. . . may choose to carry a nonproprietary card. . . . In contrast, consumers who have a strong preference for an IXC may currently choose to carry that IXC's proprietary card. . . . Finally, consumers may choose to carry two or more calling cards. . . so as to maximize their range of choice as to dialing sequence and IXC carrier at all locations." Id. at 7723.

with public phone presubscriptions.[273] We also note that the record in a related proceeding shows that by 1992 MCI and Sprint, together, had issued over 32 million proprietary cards.[274]

97. We disagree with the arguments of Sprint, MCI, and PhoneTel that the Commission should defer consideration of AT&T's status as a dominant carrier until the Billed Party Preference proceeding is resolved. The Commission recently sought comment in that proceeding on a suggestion by various parties that the Commission require OSPs to provide rate branding to callers from public phones, and that it should establish benchmarks for OSP rates as an alternative to implementing billed party preference.[275] The reclassification of AT&T as a non-dominant carrier would not affect the Commission's ability to consider and resolve these and other outstanding issues in the Billed Party Preference docket, nor would it limit the remedies available to the Commission in that proceeding.

98. With regard to CNS's argument that AT&T has negotiated advantageous billing and collection agreements with LECs that are often unavailable at the same terms to other OSPs, we note that third-party billing and collection arrangements are no longer regulated under our rules.[276] As the largest OSP, whether dominant or not, AT&T logically must look to that which is most efficient: contracting out its billing and collection functions, or performing that work in-house. Having the option of doing its own billing and collection understandably gives AT&T some advantage in negotiating favorable contracts with LECs. In addition, groups of smaller OSPs have the supplemental option of pooling their resources and setting up clearinghouses to handle the billing and collection for their combined operator services operations.

99. Finally, we note that the Commission has closely monitored operator services in recent years, and the primary problems that we have observed in this market segment have not involved AT&T.[277] Rather, it appears that, to the extent this market is not performing efficiently, this is due to OSPs that charge extremely high rates to unknowing payphone

[273] AT&T June 30, 1995 Reply at 15.

[274] BPP Phase One Order, 7 FCC Rcd at 7717.

[275] Public Notice, 10 FCC Rcd 5022 (rel. March 13, 1995).

[276] See Detariffing of Billing and Collection Services, CC Docket No. 85-88, Report and Order, 102 FCC 2d 1150 (1986).

[277] See generally Report, Final Report Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990, Federal Communications Commission at 12-33 (rel. November 13, 1992) (reporting results of third review of OSPs and aggregators).

customers.[278] We note that the Commission is moving aggressively to address these problems. For example, the Commission recently issued an order to show cause against an OSP that was the subject of numerous complaints, and we are currently investigating other carriers, none of which is AT&T.[279] More generally, the Commission, in the Billed Party Preference proceeding, will be considering various ways to prevent payphone customers from unknowingly being charged unanticipated rates. Moreover, to the extent that there are problems in this market segment, they do not appear attributable to AT&T.

(4) Analog Private Line and 800 Directory Assistance

(a) Pleadings

100. AT&T claims that, upon implementation of number portability, the Commission found that 800 services were subject to substantial competition and accordingly streamlined the regulation of those services.[280] In response, commenters point out that AT&T retains its monopoly position in the 800 directory assistance market, and they assert that the Commission itself acknowledges as much.[281] AT&T has not specifically addressed the issue of 800 directory assistance in any of its pleadings.

101. With respect to analog private line service, TRA asserts that within a twelve month period culminating a few months after the Commission adopted further streamlined regulation of AT&T's business services, AT&T proposed a series of dramatic increases in its rates for analog private line service, which inflated some charges by as much as 500 percent.[282] TRA further asserts that despite opposition from a number of its largest customers, AT&T repeatedly declined to moderate these rate increases.[283] Finally, TRA notes that AT&T recently imposed a variety of new rate increases on analog private line service that bring the total rate increases to almost 1000 percent. IDCMA asserts that

[278] See, e.g., id. at 26 ("many of the OSPs that reported the highest incidence of complaints handled very small volumes of traffic").

[279] Operator Communications Inc. d/b/a Oncor Communications Inc., DA 95-982 (rel. Apr. 27, 1995).

[280] AT&T Motion at 13 (citing Second Interexchange Competition Order, 8 FCC Rcd at 3671).

[281] Comptel November 12, 1993 Comments at 6 (citing Second Interexchange Competition Order, 8 FCC Rcd at 3669); see also MCI November 12, 1993 Comments at 6.

[282] TRA November 12, 1993 Comments at 9-10.

[283] Id.

AT&T's share of private line service market segment by the end of 1994 was 72 percent, dwarfing the ten percent share of AT&T's nearest competitor.[284] IDCMA further asserts that the HHI for this service is a high 5320 and that this demonstrates that the segment is highly concentrated.[285]

(b) Discussion

102. The Commission recently declined to streamline its regulation of AT&T's analog private line and 800 directory assistance services.[286] In the Second Interexchange Competition Order, the Commission adopted streamlined regulations for 800 services because of the implementation of 800 number portability, but declined to streamline regulation of 800 directory assistance because that service would not be affected by number portability and therefore would continue to be a monopoly service provided by AT&T.[287] We expressed concern that elimination of price cap restraints for this service would lead to higher prices.[288]

103. With respect to 800 directory assistance service, AT&T has presented no evidence to cause us to change our view that AT&T retains the ability to control prices for this service offering, since it currently is the sole provider of this service. Nevertheless, we do not foresee a significant danger that AT&T will raise substantially the price of this service to the detriment of consumers should the Commission declare AT&T non-dominant in the overall long-distance market. Other entities have indicated a desire to offer competitive directory assistance services, and such new entry would act to restrain any exercise of market power by AT&T.[289] In addition, we note that, in 1994, AT&T's revenues from 800 directory assistance service represented a mere .07 percent (0.0007) of AT&T's total

[284] IDCMA June 9, 1995 Comments at 6.

[285] Id.

[286] 1995 AT&T Price Order, 10 FCC Rcd at 3023.

[287] Second Interexchange Competition Order, 8 FCC Rcd at 3671.

[288] Id.

[289] See, e.g., Petition of the Southern New England Telephone Company for Declaratory Ruling, DA No. 95-1062 (filed May 8, 1995).

revenues for that year.[290] This amount is so small and insignificant, compared with AT&T's total revenue, as to be de minimis.

104. With respect to analog private line service, the Commission in its 1995 AT&T Price Cap Order declined to remove analog private line services from price caps based on our finding four years earlier that eliminating price cap restraints could lead to higher prices for these services, while adequate substitutes were not available to all users of analog private line services.[291] The Commission, however, noted that analog private line services are being used less frequently as analog private line customers are migrating to digital and virtual private line services.[292]

105. While we recognize that AT&T may have the ability to raise the price of analog private line service above competitive levels, the use of this analog service is declining with the advent of new digital technology and, hence, AT&T's position is unlikely to continue for a sustained period of time. We believe that the analog private line service segment, like 800 directory assistance service, is so small and insignificant relative to the overall interstate, domestic, interexchange market (accounting for only .02 percent (0.0002) of AT&T's total interstate revenues) as to be de minimis.[293] More specifically, we conclude that the record will not support a finding that the absence of close substitutes for these two discrete services demonstrates that AT&T possesses market power in the interstate, domestic, interexchange market.

106. Finally, we note that, for a period of three years, AT&T has voluntarily committed, with respect to 800 directory assistance service and its interstate analog private line service, to limit any price increases for these services to a maximum increase in any

[290] In a letter, dated June 22, 1995, from M.F. Del Casino, Administrator, Rates and Tariff, to William F. Caton, Acting Secretary, Federal Communications Commission, AT&T reported its revenues for 800 directory assistance services as $24 million for 1994. AT&T June 22, 1995 Letter (AT&T price cap filing adjusting price cap indices to reflect changes in access costs). This is approximately .07 percent of the $37 billion reported as AT&T's toll revenues for 1994. IAD 1995 Long Distance Market Share Report.

[291] 1995 AT&T Price Cap Order, 10 FCC Rcd at 3023 (citing First Interexchange Competition Order, 6 FCC Rcd at 5895).

[292] 1995 AT&T Price Cap Order, 10 FCC Rcd at 3024; First Interexchange Competition Order, 6 FCC Rcd at 5893; Price Cap Performance Review for AT&T, CC Docket No. 92-134, Report, 8 FCC Rcd 5165, 5170 (1993).

[293] In AT&T's June 22, 1995 Letter, AT&T reported its revenues for analog private line services as $8.2 million for 1994.

year of no more than the increase in the consumer price index.[294] AT&T also has voluntarily committed, for a period of three years, to file such tariff changes increasing the prices for these services on not less than five business days' notice, and to identify clearly such tariff transmittals as affecting the provisions of this commitment.[295] We believe that these commitments effectively address any concerns raised with respect to AT&T's provision of 800 directory assistance and analog private line services.

(5) Service to Alaska and Hawaii

(a) Pleadings

107. The State of Alaska (Alaska) contends that AT&T should remain classified as dominant in the provision of interstate, domestic, interexchange service to and from Alaska. Alaska notes that the Commission has taken the position that there is one geographic market for interstate, domestic, interexchange telecommunications services.[296] Alaska argues that, if AT&T is reclassified as a non-dominant carrier based on the nature of the market in the Lower 48 states, the Commission will have to reverse its policy on the single geographic market for telecommunications services, because AT&T retains market power and should remain dominant in Alaska.[297] Alaska expresses concern that, given the unique requirements of the Alaska market, any reduction in AT&T's obligation to serve could leave Alaska without service or the benefits of rate integration.[298] The Alaska PUC similarly urges the Commission to maintain AT&T's obligations to provide service to Alaska on the same terms and conditions as throughout the rest of the nation.[299] The State of Hawaii (Hawaii) maintains that the effects of granting AT&T's motion on rate integration, geographic averaging, and universal service have not been adequately addressed in the record.[300] Hawaii expresses concern about the effects on rate integration, because, according to Hawaii, AT&T previously has asserted that it is not required to offer certain services to Hawaii at integrated rates.[301] Hawaii claims that AT&T has also raised questions about the feasibility of continuing to offer MTS and WATS at geographically averaged rates.[302] Finally, Hawaii and Alaska urge the Commission to ensure that the current tariff review procedures regarding geographic deaveraging of rates are not altered if AT&T is classified as non-dominant.[303]

108. ATA, the City of Anchorage (Anchorage), and GCI raise issues related to the merger of AT&T and Alascom. ATA and GCI contend that any declaration of non-dominant status for AT&T should not be applied to AT&T/Alascom.[304] ATA argues that, without the designation of a dominant carrier and its obligation to serve, many communities in Alaska would be left without access to intrastate or interstate service.[305] GCI also claims that, upon AT&T's purchase of Alascom, AT&T/Alascom will have control over monopoly bottleneck facilities in Bush, Alaska.[306] Anchorage contends that the Alaska market is a duopoly, with Alascom and GCI moving their rates in unison with little benefit to the consumer.[307]

109. In response to the AT&T September 21, 1995 Ex Parte Letter and the AT&T October 5, 1995 Ex Parte Letter, Alaska, Hawaii and LBC Joint Commenters express concerns that AT&T's voluntary commitments do not ensure geographically averaged rates.[308] GCI asks the Commission to confirm that AT&T must comply with all requirements

[294] AT&T September 21, 1995 Ex Parte Letter at 2, as clarified by AT&T October 5, 1995 Ex Parte Letter at 3.

[295] AT&T September 21 Ex Parte Letter at 2.

[296] Alaska November 12, 1993 Comments at 1 n.2.

[297] Id. (citing Fourth Report and Order, 94 FCC 2d at 573-76).

[298] Id. at 2. LBC Joint Commenters also ask the Commission to ensure that, even if AT&T is reclassified as non-dominant, it not be allowed to discontinue service to rural areas without another facilities-based carrier available. LBC Joint Commenters June 9, 1995 Comments at 1-4.

[299] Alaska PUC October 4, 1995 Ex Parte Letter at 1-2.

[300] Hawaii December 3, 1993 Reply Comments at 5-18.

[301] Id. at 9-10.

[302] Id. at 12-13.

[303] Hawaii September 25, 1995 Ex Parte Letter at 2-3; Alaska October 4, 1995 Ex Parte Letter at 1-2.

[304] ATA November 12, 1993 Comments at 1-2; GCI June 30, 1995 Reply Comments at 3.

[305] Id. at 2.

[306] GCI June 30, 1995 Reply Comments at 3.

[307] Anchorage November 12, 1993 Comments at 2. Anchorage claims that Alascom and GCI benefited from about $20 million dollars in access cost reductions for the 1993-94 access tariff period, but passed on none of the savings to customers. Id.

[308] Hawaii September 25, 1995 Ex Parte Letter at 2-4; LBC Joint Commenters October 3, 1995 Ex Parte Letter at 2; Alaska October 4, 1995 Ex Parte Letter at 2; Hawaii October 5, 1995 Ex Parte Letter at 1-2.

imposed on Alascom and AT&T by the Market Structure Order and the Alascom Authorization Order.[309]

(b) Discussion

110. The Commission has long supported the policies of geographic rate averaging for interstate, domestic, interexchange services,[310] and of rate integration between the contiguous forty-eight states and various noncontiguous U.S. regions, including Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands.[311] We remain committed to these policies.

111. We do not believe that our reclassification of AT&T threatens our policies of geographic averaging and rate integration. Our rate integration policy was established with the introduction of satellite technology in the domestic telecommunications market in 1972.

[309] GCI October 4, 1995 ex parte letter from Kathy L. Shobert, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission (citing Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, Memorandum Opinion and Order, 9 FCC Rcd 3023 (1994) (Market Structure Order), adopting Joint Board Final Recommended Decision, 9 FCC Rcd 2197 (1993) (Final Recommended Decision); Application of Alascom Inc., AT&T Corp. and Pacific Telecom, Inc. for Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corp., File Nos. W-P-C-7037, 6520, Order and Authorization, FCC No. 95-334 (rel. Aug. 2, 1995) (Alascom Authorization Order)).

[310] See AT&T Price Cap Order, 4 FCC Rcd at 3132-34; Interexchange Competition NPRM, 5 FCC Rcd at 2646, 2649; AT&T Price Cap Reconsideration Order, 6 FCC Rcd at 679.

[311] See Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, Docket No. 16495, 35 FCC 2d 844 (1972) (Domsat II), aff'd on recon., 38 FCC 2d 665 (1972) (Domsat II Reconsideration), aff'd sub nom. Network Project v. FCC, 511 F.2d 786 (D.C. Cir. 1975); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, 61 FCC 2d 380 (1976) (1976 Integration of Rates and Services Order), recon. denied, 65 FCC 2d 324 (1977); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, File No. W-P-C-649 et al., Memorandum Opinion and Order, 72 FCC 2d 715 (1979); Final Recommended Decision, 9 FCC Rcd 2196; Market Structure Order, 9 FCC Rcd 3023; Alascom Authorization Order, FCC No. 95-334 (rel. Aug. 2, 1995).

In the Domsat II order, the Commission concluded that the distance-insensitive nature of the cost of those facilities provided a sound economic basis to support the integration into the domestic rate pattern of communications services between noncontiguous points[312] and the forty-eight contiguous states.[313] The Domsat II order required any carrier that provided domestic satellite service between the contiguous forty-eight states and various noncontiguous U.S. states and territories to do so pursuant to a plan to integrate its rates and services.[314] The Commission also specifically required AT&T to offer such services.[315]

112. In the early 1980s, the Commission extended various competition-promoting policies to noncontiguous points. For instance, the Commission extended its Competitive Carrier policies to those points.[316] Shortly thereafter, the Commission commenced an inquiry to evaluate its rate integration policy for noncontiguous points in light of its new competitive policies.[317] In 1985, the Commission terminated this inquiry with respect to Hawaii, Puerto Rico, and the Virgin Islands.[318] The Commission concluded, based on the comments received on that notice of inquiry, "that existing rate integration policies and competition in

[312] The Domsat II order applied our rate integration policy to Alaska, Hawaii, and Puerto Rico. The policy was later extended to cover the U.S. Virgin Islands. Integration of Rates and Services., 72 FCC 2d 715 (1979).

[313] Domsat II, 35 FCC 2d at 856-57.

[314] Id. at 857; see also Domsat II Reconsideration, 38 FCC 2d at 692-697; 1976 Integration of Rates and Services Order, 61 FCC 2d at 385-390; Application of GTE Corp. and Southern Pacific Co. for Consent to Transfer Control of Southern Pacific Communications Company and Southern Pacific Satellite Company, Memorandum Opinion and Order, 94 FCC 2d 235, 259-260 (1983) (obligating "GTE Sprint" to integrate its Mainland-to-Hawaii rates).

[315] Domsat II, 35 FCC 2d at 858.

[316] See Fourth Report and Order, 95 FCC 2d at 575-76.

[317] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, Notice of Inquiry, 96 FCC 2d 567 (1983).

[318] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, Notice of Proposed Rulemaking, 50 FR 41714 (Oct. 15, 1985).

the provision of service to these three points are compatible."[319] The Commission noted, however, that the comments on the notice of inquiry "offered no consensus concerning the compatibility of rate integration and competitive policies in the Alaska interstate telecommunications market."[320] The Commission, therefore, established a Joint Board for a recommendation on any changes necessary to harmonize rate integration and competition in the Alaska interstate market.[321]

113. Between 1986 to 1992, the Joint Board on numerous occasions solicited comments, data, and proposals regarding the Alaska interstate market structure.[322] In these orders inviting comments, the Commission reaffirmed the continuing obligation of AT&T to maintain integrated rates for Alaska.[323] In 1993, the Joint Board recommended that the Commission adopt a new market structure.[324] As part of its recommendations, the Joint Board "recommended that AT&T be responsible for providing Alaskan customers with interstate MTS at the same integrated rate levels and under the same terms and conditions available to other AT&T customers in the rest of the nation."[325] The Joint Board's rate integration recommendation for interstate services to and from Alaska was not based on AT&T's dominant classification, but rather on AT&T's existing rate integration

[319] Id. at para. 10.

[320] Id. at para. 13.

[321] Id. at para. 14.

[322] See Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, CC Docket No. 83-176, Order Requesting Data and Inviting Comments, RM 4436, FCC 86J-2 (rel. May 9, 1986); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, CC Docket No. 83-176, Supplemental Order Inviting Comments, 4 FCC Rcd 395 (1989) (Supplemental Order).

[323] See Supplemental Order, 4 FCC Rcd at 397; see also Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, CC Docket No. 83-176, Tentative Recommendation and Order Inviting Comments, 8 FCC Rcd 3684, 3687-88 (1993); Market Structure Order, 9 FCC Rcd at 3023-24.

[324] Final Recommended Decision, 9 FCC Rcd 2197.

[325] Id. at 2204.

obligations.[326] In its Market Structure Order, the Commission adopted the Joint Board's recommendations, including the recommendation to require AT&T to provide integrated rates for interstate services to and from Alaska.[327] Because AT&T's rate integration obligations were not premised on its dominant carrier classification, we conclude that AT&T's reclassification does not affect the continuing effectiveness and validity of those orders.

114. In addition, even if those orders would not continue to remain in effect, AT&T has voluntarily committed to continue to comply with the Commission's orders regarding rate integration,[328] and has committed to comply with all the obligations and conditions set forth in the Alascom Authorization Order, the Market Structure Order, and the Final

[326] Id.

[327] Market Structure Order, 9 FCC Rcd at 3024-25.

[328] AT&T September 21, 1995 Ex Parte Letter at 1; Wallman October 4, 1995 Letter at 1, Appendix A; AT&T October 5, 1995 Ex Parte Letter at 1.

Recommended Decision.[329] Finally, AT&T has committed to file any tariff containing a geographically deaveraged rate on five business days' notice.[330]

[329] AT&T September 21, Ex Parte Letter at 1, as clarified by AT&T October 5, 1995 Ex Parte Letter at 1; see also Wallman October 4, 1995 Letter at 1. These conditions include the following: (1) AT&T must provide MTS service between Alaska and the Lower 48 (northbound and southbound), and between Alaska and Hawaii, at integrated rates under the terms and conditions applicable to AT&T's provision of services to the Lower 48. Final Recommended Decision, 9 FCC Rcd at 2204. (2) Alascom must provide interexchange common carrier services under tariff offered on a non-discriminatory basis at rates that reflect the cost of service. Id. at 2204-06. Alascom's tariff would have separate rate schedules for locations subject to facilities competition (non-Bush) and for locations where Alascom has a facilities monopoly (Bush). Id. (3) Alascom must continue to provide interstate private line service upon reasonable request under its existing federal tariffing and Section 214 obligations. Id. at 2207. If AT&T provides interstate private line services to or from Alaska, it must do so under the same rate structures, terms, and conditions that apply to its provision of private line services between other states. Id. (4) The Joint Service arrangement between AT&T and Alascom continues until January 1, 1996, when it terminates. Market Structure Order, 9 FCC Rcd at 3032. (5) A four year transition period began on July 1, 1994 and will terminate on June 30, 1998. There are two phases in this transition period, the first phase began July 1, 1994 and the second will begin January 1, 1996. Id., 9 FCC Rcd at 3025 n.15. (6) During the first phase of the market structure transition, AT&T paid Alascom $75 million on July 1, 1994 and must pay an additional $75 million by January 1, 1996 in order to reduce Alascom's account balances. Id.; Final Recommended Decision, 9 FCC Rcd at 2214-16. (7) During the second phase, lasting two-and-half years, AT&T is required to purchase a fixed amount of common carrier service from Alascom, defined as a percentage of a baseline revenue level. This obligation will decline to zero at the end of the second phase. Market Structure Order, 9 FCC Rcd at 3025-26; Final Recommeded Decision, 9 FCC Rcd at 2216. (8) AT&T must file with the Internal Revenue Service and the State of Alaska for rulings on whether the $150 million payment to Alaska is taxable income to AT&T/Alascom. Market Structure Order, 9 FCC Rcd at 3032. (9) AT&T is free to build or lease facilities subject to dominant carrier authorization rules. Final Recommended Decision, 9 FCC Rcd at 2203. If AT&T chooses to build facilities, then it must make its facilities available to other carriers under tariff. Id. Alascom is governed by dominant carrier rules where it has a facilities monopoly, namely, the Bush areas. Id. Alascom must build facilities in Bush areas to allow provision of service to communities of 25 or more. Id.

[330] AT&T September 21, 1995 Ex Parte Letter at 2.

115. We believe that our outstanding orders, together with AT&T's explicit commitments, adequately address concerns that granting AT&T's motion will lead to the loss of both rate integration for residents of Alaska, Hawaii and other locations and geographically averaged rates. We remain committed to the policies of rate integration and geographic averaging. At the same time, we recognize that these policies originally were developed for an interstate, domestic, interexchange market that bears little resemblance to the current market. Accordingly, we intend to examine in our upcoming review of this market the implication of the changes in the interexchange market for our rate integration and geographic averaging policies.

(6) Other Services

(a) Pleadings

116. A number of parties who resell AT&T services take issue with AT&T's characterization of the long distance industry as competitive and with AT&T's claim that it lacks market power.[331] They claim that AT&T is uniquely positioned to engage in anticompetitive behavior that inhibits resale, and they allege a pattern of behavior by AT&T that is contrary to our policies promoting resale.[332] They suggest that the Commission adopt a set of safeguards designed to ensure that, when AT&T implements tariff changes that may adversely impact resellers, resellers have adequate opportunity to review and challenge the changes before the tariff goes into effect.[333]

117. Several commenters argue that AT&T has engaged in a pattern of anticompetitive conduct specifically focused on the resale industry, and that such conduct precludes a public interest finding supporting the deregulatory measure requested by

[331] See e.g., TRA June 9, 1995 Comments at 8; Affinity November 12 1993 Comments at 39-42; Ad Hoc IXCs November 12, 1993 Comments at 2.

[332] See, e.g., Ad Hoc IXCs November 12, 1993 Comments at 2; ETS November 12, 1993 Comments at 9-10; Affinity November 12, 1993 Comments at 7-23.

[333] See, e.g., PSE/NEWS June 9, 1995 Comments at 1-2; TRA June 9, 1995 Comments at 72-73; CNSUG November 12, 1993 Comments at 1-2, 4-5; GE Exchange November 12, 1993 Comments at 3-4; IBM December 3, 1993 Reply Comments at 13-15.

AT&T.[334] For example, some commenters state that AT&T has refused or attempted to refuse to permit the resale of certain Tariff 12 Options in violation of our resale policies.[335]

118. A number of parties dispute whether AT&T truly lacks market power when dealing with resellers. TRA contends that AT&T, with its sixty percent market share and non-dominant status, could engage in predatory pricing strategies, as well as other strategies, such as making design changes that render competitors' products incompatible with the customer's product system, thereby raising the costs of competitors and driving them out of the market.[336] TRA also expresses concern about the risk of tacit collusion among AT&T, MCI, and Sprint. TRA characterizes these carriers as "oligopolists" controlling 88 percent of the interexchange market.[337] TFG alleges that, because resellers need AT&T more than AT&T needs the resellers, and because of AT&T's large resources, AT&T can evade Commission policies, knowing that resellers have little choice but to accede to AT&T's demands.[338] Affinity disputes AT&T's characterization of easy entry in the long distance market through resale.[339] ETS contends that the fact that the Commission has had to suspend, investigate and sometimes reject AT&T's tariff filings is evidence of AT&T's anticompetitive behavior and market power.[340]

119. Several resellers express concern that allowing AT&T to file tariff revisions on one day's notice may threaten the continued viability of the resale market. PSE and NEWS contend that because the "filed rate doctrine" dictates that tariff terms and conditions prevail over any inconsistent language in a contract, AT&T can unilaterally modify or abrogate a

[334] Ad Hoc IXCs November 12, 1993 Comments at 6-21; see also Comptel November 12, 1993 Comments at 15; IDCMA June 9, 1995 Comments at 6; TFG June 9, 1995 Comments at 23-28; Affinity June 9, 1995 Comments at 7-23.

[335] E.g., Ad Hoc IXCs November 12, 1993 Comments at 10-11, 15; Affinity November 12, 1993 Comments at 16-22.

[336] TRA June 9, 1995 Comments at 37. TRA adds that most of the "hundreds of competitors" alluded to by AT&T are switchless resellers that constitute a two percent share of the interstate interexchange market. TRA November 12, 1993 Comments at 7; see also ETS November 12, 1993 Comments at 7 n.19.

[337] TRA June 9, 1995 Comments at 35.

[338] TFG June 9, 1995 Comments at 28.

[339] Affinity November 12, 1993 Comments at 30.

[340] ETS November 12, 1993 Comments at 9; see also TFG June 9, 1995 Comments at 17-18.

reseller's service arrangement at any time by filing an adverse tariff.[341] PSE and NEWS argue that, absent a 14-day notice period, such a revision would take effect with no opportunity for affected customers, resellers, or Commission staff to block it.[342] PSE and NEWS further contend that despite resale mandates, and the increasing level of competition in the interstate marketplace, AT&T has repeatedly used the power of preemptive tariff filing to revise unilaterally or abrogate long-term deals to the disadvantage of resellers and even AT&T's commercial customers.[343]

120. CNSUG and GE Capital Exchange contend that we should grant AT&T's motion only if we adopt safeguards designed to protect resellers from termination of service offerings on short notice.[344] They contend that we should require AT&T to: give advance notice to customers of any tariff filing that materially alters negotiated agreements; gain the consent of all such affected customers before making such a filing, with such filing being effective on at least 14 days' notice; treat any lack of such consent to a proposed tariff change as prima facie evidence of its unlawfulness; allow any affected customer that has not consented, either to terminate its service arrangement without liability or to enforce the unchanged term; and provide a reasonable period of rate stability to permit service migration if the customer chooses to terminate its service agreement.[345]

121. The Ad Hoc Telecommunications Users Committee (Ad Hoc Committee) contends that allowing AT&T to file tariff revisions regarding long-term service arrangements on less than 14 days' public notice would violate the Act's provision for pre-effectiveness review of tariff revisions.[346] Ad Hoc Committee argues that, while the market would eventually punish a company that makes a practice of breaching its contracts, such corrections provide no timely relief for wronged parties, who require more than one day to assure themselves that any tariff revisions accurately reflect the bargains struck with the

[341] PSE/NEWS June 9, 1995 Comments at 6-7.

[342] Id. at 7.

[343] Id. at 8.

[344] CNSUG November 12, 1993 Comments at 1-2, 4-5; GE Exchange November 12, 1993 Comments at 3-4; see also API December 3, 1993 Reply Comments at 6-8.

[345] Id.

[346] Ad Hoc Committee June 9, 1995 Comments at 3; see also Ad Hoc Committee September 29, 1995 Ex Parte Letter at 1-4. Other parties also support the retention of a 14-day tariff filing requirement. See, e.g., PSE/NEWS June 9, 1995 Comments at 2; TRA June 9, 1995 Comments at 5; Sprint June 30, 1995 Reply Comments at 2; TFG November 12, 1993 Comments at 4.

carrier.[347] Therefore, Ad Hoc Committee argues, it is important for customers to have 14 days to review tariff revisions actually filed before they become effective.[348] TRA also would retain the requirement that AT&T obtain prior approval under Section 214 of the Act before discontinuing service.[349]

122. Some commenters further propose that the Commission require AT&T to make a special showing to support any tariff changes that will modify long-term contracts. IBM suggests that any tariff that abrogates provisions of a long-term contract should be treated as unreasonable, unless AT&T showed that "drastically changed circumstances" had made the contract terms inconsistent with the public interest.[350] API would require AT&T to *justify* alterations of existing long-term contracts by a "substantial cause" showing, and would make any abrogation of an AT&T commitment not to modify its rates, terms and conditions per se unlawful under Sections 201(b) and 205 of the Act.[351]

123. Several parties also state that the complaint process under Section 208 of the Act fails to provide prompt and effective relief to resellers harmed by AT&T's practices. TFG contends that the Commission does not have the resources to address in a timely manner the large number of complaints against AT&T.[352] TFG adds that litigation is not a viable alternative to the tariff review process because of the high costs of litigation.[353] PSE and NEWS maintain that enforcement proceedings are not adequate because such proceedings have limited remedies, and that Section 208 complaints are far more resource-intensive than the tariff review process.[354] TRA believes that granting AT&T's petition will nullify many of the Commission's mechanisms for enforcing the Act.[355]

[347] Ad Hoc Committee June 9, 1995 Comments at 4.

[348] Id. at 6; see also TRA June 9, 1995 Comments at 39, 72.

[349] TRA June 9, 1995 Comments at 5, 39.

[350] IBM December 3, 1995 Reply Comments at 13-15.

[351] API December 3, 1993 Reply Comments at 6-7.

[352] TFG June 9, 1995 Comments at 21, 26; see also Ad Hoc IXCs November 12, 1993 Comments at 10-15.

[353] TFG June 9, 1995 Comments at 27.

[354] PSE/NEWS June 9, 1995 Comments at 10-11.

[355] TRA June 9, 1995 Comments at 39-46, 68-69.

124. In response, AT&T reiterates that the interstate interexchange marketplace is competitive and disputes assertions made by the commenters about AT&T's treatment of resellers.[356] AT&T describes as "fanciful" claims that AT&T has been able to prevent resale of its Tariff 12 and SDN services.[357] AT&T states that at least nine Tariff 12 options are being resold and that there are at least 80 resellers of its SDN services.[358]

125. AT&T also argues that the pendency of lawsuits does not establish the validity of the specific facts or legal claims alleged therein.[359] AT&T argues that even if the resellers' claims were true, those claims would not warrant a finding that AT&T has market power.[360] AT&T argues that services that are the subject of resellers' complaints compete with comparable offerings of MCI, Sprint, and other carriers, among which the Commission has found competition to be thriving.[361] AT&T has estimated that it will provide only 20.3 percent of the services that are resold in 1996, down from 25.6 percent in 1994.[362]

126. AT&T argues that competitive market forces will fully protect consumers and business customers from anticompetitive behavior by any interexchange carrier, because these forces drive all carriers to either act reasonably or face mass defection by their customers to other carriers.[363] AT&T contends that maintenance of the current dominant/non-dominant dichotomy makes no sense, because regulatory requirements that apply differently to AT&T and its competitors harm consumers, and handicap AT&T's ability to compete effectively across the entire market.[364]

127. AT&T argues generally that "advance tariff review procedures and other constraints serve only to provide competing firms with a 'regulatory forum to challenge and

[356] AT&T December 3, 1993 Reply Comments at 31.

[357] Id. at 32.

[358] Id.

[359] Id.

[360] Id. at 33.

[361] Id. at 33-34.

[362] Ex Parte Presentation in Support of AT&T's Motion for Reclassification as a Non-Dominant Carrier, CC Docket No. 79-252, filed August 16, 1995, "Market Dynamics" graph (AT&T August 16, 1995 Ex Parte Filing).

[363] AT&T April 24, 1995 Ex Parte Filing at 52.

[364] AT&T June 30, 1995 Reply Comments at 3-8.

delay' each other's service and pricing innovations, resulting in the protection of competitors rather than consumers."[365] It claims that such constraints impede competition and impose costs on users.[366] As an example, AT&T explains that, when it files a tariff revision aimed at competing with other carriers' new services, competing non-dominant carriers can challenge the AT&T offering before the Commission during the 45-day notice period.[367] Meanwhile, the competing carriers can then duplicate AT&T's proposed offering on only one day's notice, before AT&T's offering emerges from the tariff review process.[368] In this way, AT&T asserts, consumers are "deprived of prompt action by AT&T to reduce prices or introduce innovative programs that save consumers real dollars.[369] AT&T notes that many states have eliminated such regulatory differences.[370] Moreover, AT&T contends that our consideration of the tariff-related conditions suggested by commenters, such as a 14-day notice period, is impermissible in this proceeding because such conditions do not address the issue of whether AT&T meets the Commission's test for non-dominance.[371]

128. CSE supports AT&T's claims regarding substantial competition in the interexchange market[372] and argues that resale carriers are viable competitors in that market.[373] CSE maintains that, even if AT&T were found guilty of the transgressions alleged by the resellers, it is not clear why classifying AT&T as non-dominant would enhance AT&T's ability to engage in the allegedly anticompetitive practices.[374] CSE argues that, in any event, the Commission need not apply the full panoply of dominant carrier regulations to address and correct limited transgressions.[375]

[365] AT&T Motion at 17.

[366] Id.

[367] AT&T April 24, 1995 Ex Parte Filing at 35-37.

[368] Id. at 37.

[369] Id.

[370] Id. at 41.

[371] AT&T June 30, 1995 Reply Comments at 42.

[372] CSE June 9, 1995 Comments at 5.

[373] Id. at 6-7.

[374] Id. at 7.

[375] Id.

(b) Discussion

129. We have closely considered the commenters' claims that AT&T possesses market power with respect to resellers and that its alleged anticompetitive behavior toward resellers demonstrates the existence of such market power.[376] According to AT&T's calculations, which are the only evidence in the record, AT&T had only 25.6 percent of the resale market segment in 1994.[377] By 1996, AT&T estimates that its share will have dropped to only 20.3 percent of the approximately $5.6 billion in services that will be resold.[378] Thus it appears that adequate alternative sources of supply exist for resellers that do not wish to take service from AT&T. Moreover, AT&T's small and shrinking market share represents persuasive evidence that AT&T lacks market power in this market segment.[379] Thus, consistent with our earlier findings regarding the structure and performance of the overall, interstate, domestic, interexchange market, we conclude that the record in this proceeding will not support a finding that AT&T can exercise unilateral market power over the resale industry.

130. The opposing commenters assert that AT&T does not now act reasonably with regard to resellers, even under dominant carrier regulation, and will act more unreasonably if freed from such regulation.[380] To support these contentions, they describe various pending disputes between AT&T and certain resellers. AT&T, however, disputes many of the facts alleged by the commenters in support of their claims.[381] For example, although the opposing commenters claim that AT&T refuses to allow resale of SDN services and certain Tariff 12 options, AT&T contends that those services are currently offered by resellers.[382] We think it significant that prohibitions against unjust and unreasonable rates, practices, and discrimination in Sections 201(b) and 202(a) of the Act apply equally to dominant and non-dominant carriers. The status of AT&T as either a dominant or non-dominant carrier, therefore, does not alter its obligation to comply with those sections of the Act.

[376] See, e.g., TRA June 9, 1995 Comments at 37; TFG June 9, 1995 Comments at 28; ETS November 12, 1993 Comments at 9; Affinity November 12, 1993 Comments at 30.

[377] AT&T August 16, 1995 Ex Parte Filing, "Market Dynamics" graph.

[378] Id.

[379] See id.

[380] See, e.g., PSE/NEWS June 9, 1995 Comments at 6-7; Ad Hoc Committee June 9, 1995 Comments at 4; TRA June 9, 1995 Comments at 39, 72.

[381] AT&T December 3, 1993 Reply Comments at 31-32.

[382] Id.

131. Several commenting parties suggest that, even if we find AT&T to be non-dominant, we should require AT&T to abide by certain tariffing requirements that are not part of the regulatory scheme that we apply to non-dominant carriers. After consideration of all of these proposals, we conclude that the measures suggested by the commenters should not be adopted as part of our determination that AT&T is non-dominant. Most prominent among the proposals advanced by the commenters is the notice period before tariff revisions can take effect. The commenters generally favor a notice period longer than the one-day notice period applicable to non-dominant carriers, particularly for revisions to long-term or contract-based arrangements. We have previously held that advance scrutiny of the interstate tariffs of non-dominant carriers is unnecessary,[383] and that post-effective tariff review and our complaint process provide adequate means of redress.[384] We will be reexamining these conclusions as they apply to all interexchange carriers in a new proceeding, but, pending the outcome of that proceeding, we are not persuaded that we should treat AT&T differently from other non-dominant carriers. We also note that, contrary to suggestions by some commenters, nothing in the Act requires pre-effectiveness tariff review.

132. With respect to concerns that customers will not have sufficient opportunity to ensure that AT&T accurately implements in its contract tariffs the underlying contractual agreements, we note that AT&T is already obliged to file contract tariffs that reflect the terms of the underlying agreements.[385] AT&T is also required by Sections 201 and 202, respectively, to offer service pursuant to rates, terms and conditions that are just, reasonable and not unduly discriminatory. In enforcing Sections 201 and 202 with respect to contract tariff services, we have the authority to require the filing of the underlying contract to ensure that the contract tariff comports with that agreement.[386] In complaint and enforcement proceedings, we will carefully scrutinize AT&T's contract tariff practices to ensure that its contract tariffs accurately reflect the underlying agreements reached between AT&T and its customers.

133. Certain commenters raise issues implicating the "substantial cause" test. The "substantial cause" test holds that tariff revisions altering material terms and conditions of a long-term service tariff will be considered reasonable only if the carrier can make a showing

[383] See, e.g., Tariff Filing Requirements Order, 8 FCC Rcd at 6752, 6756-57.

[384] February 1995 Interexchange Reconsideration Order, 10 FCC Rcd at 4562, 4574 n.51; Tariff Filing Requirements Order, 8 FCC Rcd at 6756-57. We recently reaffirmed this conclusion in our Tariff Filing Requirements Remand Order. Tariff Filing Requirements Remand Order, FCC 95-399 at para. 16.

[385] First Interexchange Competition Order, 6 FCC Rcd at 5897, 5902.

[386] See id. at 5902 n.194.

of substantial cause for the revisions.[387] In response to concerns of IBM and API that AT&T be required to justify any changes to contract-based tariffs, we note that we recently affirmed the applicability of the "substantial cause" test to tariff revisions that alter material terms and conditions of a long-term contract, and we clarified that this test applies to any unilateral tariff modification by *non-dominant* as well as dominant carriers.[388] Accordingly, if AT&T files a modification to a contract-based tariff, we will take into account that the original tariff terms were the product of negotiation and mutual agreement, and we will consider on a case-by-case basis, in light of all the relevant circumstances, whether a substantial cause showing has been made.[389] We will apply the substantial cause test in this way in any post-effective tariff investigation, pursuant to Section 205, and in complaint proceedings.[390] We also will consider, on a case-by-case basis, whether to allow customers to terminate contracts without liability.[391]

134. Finally, we note that AT&T has voluntarily committed to implement certain measures that are designed to address criticisms of its business practices that resellers have raised in this proceeding and elsewhere.[392] AT&T represents that the following reflects an agreement with the Telecommunications Resellers Association, and AT&T has committed to comply with this agreement:

> As a general practice, AT&T grandfathers both existing customers and subscribed customers (i.e., customers who have submitted a signed order for service) when it introduces a change to a term plan (including Contract Tariffs, term plans under Tariffs 1, 2, 9, and 11, Tariff 12 Options and Tariff 15 CPPs), and it commits to continue that process. In exceptional cases, however, grandfathering may not be appropriate either because: (1) a change is necessitated by typographical errors, a service inadvertently priced below costs, rate changes where no individual rates (post-discount) are increased, or other comparable circumstances, or (2) the change is necessary to bring clarity to a non-

[387] RCA American Communications, Inc. Revisions to Tariff F.C.C. Nos. 1 and 2, CC Docket No. 80-766, Memorandum Opinion and Order, 86 FCC 2d 1197, 1201-02 (1981); see also First Interexchange Competition Order, 6 FCC Rcd at 5898 n.155; February 1995 Interexchange Reconsideration Order, 10 FCC Rcd at 4574, and n.51.

[388] February 1995 Interexchange Reconsideration Order, 10 FCC Rcd at 4574, and n.51.

[389] Id. at 4574.

[390] Id. at 4574 n.51.

[391] Id.

[392] AT&T September 21, 1995 Ex Parte Letter.

rate term or condition, where it is necessary to treat all customers alike (such as a change to the provisions for how orders are processed, but not including changes to the body of Contract Tariffs, Tariff 12 Options or Tariff 15 CPPs). In such circumstances, AT&T commits for a twelve-month period to offer its customers the following additional protections not required of non-dominant carriers:

- where AT&T makes any change to an existing term plan, AT&T will afford the affected customers 5 days meaningful advance notice of the tariff filing to give the customer the opportunity to object; provided, however, that for changes to discontinuance with or without liability, deposits and advance payments, or transfer or assignment of service, AT&T will file on 14-days' notice. (AT&T would have the unaffected right to change underlying tariff rates -- such as a general change to SDN rates -- unless the term plan protected the customer from such changes.) Where the affected customer(s) agrees to the revision, AT&T will note that agreement in its transmittal letter and file the change on 1 day's notice. Where the affected customer objects to the change, AT&T will file the change with the Commission on 6 days' notice. With respect to the 14 or 6 days notice filings, the substantial cause test will be applicable to the same extent as it is today.[393]

135. AT&T has also voluntarily committed to report to the Common Carrier Bureau and to the Telecommunications Resellers Association Executive Board, on a quarterly basis, its performance in processing reseller orders.[394] This commitment is for a term of one year.[395] In addition, for at least twelve months, AT&T will provide a single point of contact to receive reseller complaints not resolved through the first point of contact, the AT&T account manager.[396] Finally, AT&T represents that it has agreed with the Telecommunications Resellers Association to establish alternative dispute resolution procedures:

> AT&T is willing to establish a quick, efficient, commercially-oriented process for resolving disputes with its reseller customers. AT&T is willing to enter into mutually agreeable private party arbitration agreements with these parties. AT&T is also willing to develop with the Telecommunications Resellers Association Executive Board a model two-way Arbitration Agreement. AT&T would be willing to enter into such an agreement with any of its reseller customers for resolution of commercial disputes between the reseller and AT&T under the following guidelines:
>
> a) The Arbitration Agreement would be based on the United States Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association.
>
> b) The Arbitration Agreement would bind each party to arbitration as the exclusive remedy for any covered claims that arise in the period covered by the agreement. The covered period initially would be twelve months, but the reseller will be permitted to end the covered period earlier by providing at least 30 days prior written notice.
>
> c) Covered claims would include all claims between the parties relating to tariffed services, the carrier-customer relationship between the parties, or competitive practices, except claims that a tariff provision or practice is unlawful under the Communications Act would not be covered claims. Covered claims would include, for example, claims that AT&T has misapplied or misinterpreted its tariffs, that the customer has failed to comply with its tariff obligations, or that either party has engaged in unlawful competitive practices such as misrepresentation or disparagement.
>
> d) The Arbitration Agreement would provide for a 90 day arbitration process, unless the parties agree to a longer period.[397]

136. MCI argues that AT&T's commitment in its September 21, 1995 letter to grandfather, at its discretion, existing customers adversely affected by unilateral contract changes (permitting them to receive AT&T performance on the same terms and conditions as the original contract), or allowing them to terminate their agreements with AT&T without liability if they pay under utilization charges, is "patently anti-consumer."[398] We note,

[393] AT&T October 5, 1995 Ex Parte Letter at 2. AT&T states that the quoted provisions replace paragraph (7) of AT&T's September 21, 1995 Ex Parte Letter in its entirety. Id.; see also TRA October 5, 1995 Ex Parte Letter.

[394] AT&T September 21, 1995 Ex Parte Letter at 3, as clarified by AT&T October 5, 1995 Ex Parte Letter at 3.

[395] AT&T October 5, 1995 Ex Parte Letter at 3.

[396] AT&T September 21, 1995 Ex Parte Letter at 4.

[397] AT&T October 5, 1995 Ex Parte Letter at 2-3. AT&T states that the quoted provisions replace paragraph (10) of AT&T's September 21, 1995 Ex Parte Letter in its entirety. Id.; see also TRA October 5, 1995 Ex Parte Letter.

[398] MCI October 2, 1995 Ex Parte Letter at 2.

however, that AT&T's October 5, 1995 Ex Parte Letter clearly addresses the concerns raised by MCI. We believe that the commitments proffered by AT&T in its October 5, 1995 Ex Parte Letter contribute to addressing the tariff-related concerns raised by the commenters in this proceeding, and we therefore order AT&T to comply with these voluntary commitments.

137. We also note that some of the tariff-related issues raised by commenting parties transcend the scope of this proceeding. For example, questions concerning the application of the filed rate doctrine to contract tariffs may arise with respect to carriers other than AT&T. We intend to examine these and other questions in the context of our review of our regulatory scheme governing the interstate, domestic, interexchange industry.

c. Summary of Findings and Conclusion

138. Under our Competitive Carrier paradigm, a carrier is to be declared dominant only if it possesses market power in the relevant product and geographic market. Conversely, a carrier qualifies as non-dominant if it lacks market power in the relevant market. In the Fourth Report and Order, the Commission defined market power alternatively as the "ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable,"[399] and as the "'ability to raise prices by restricting output.'"[400] In the Fourth Report and Order, the Commission further found that the relevant product market for assessing whether a carrier was dominant was the market for "all interstate, domestic, interexchange telecommunications services," and that there were no relevant submarkets.[401] As discussed above, we are applying that market definition here. Also, as discussed, we are deciding whether to grant AT&T's motion to be declared non-dominant, on the basis of whether AT&T still possesses market power in the overall market for interstate, domestic, interexchange telecommunications services. Under this standard, a finding that a carrier possesses some ability to raise and maintain prices for one or more discrete services does not require that the carrier be classified as dominant.

139. Applying this standard to the record in this proceeding leads us to conclude that AT&T lacks market power in the relevant market -- that is, the overall market for interstate, domestic, interexchange telecommunications services. In arriving at this conclusion, we have applied well-accepted principles of economics and antitrust analysis. More specifically, we have examined such market structure factors as supply elasticity, demand elasticity, market share, and trends in market share.[402] In addition, we have

[399] Id. (quoting Landes & Posner, supra n.79, 94 Harv. L. Rev. at 937).

[400] Fourth Report and Order, 95 FCC 2d at 558 (quoting II P. Areeda & D. Turner, Antitrust Law 322 (1978)).

[401] Id. at 564.

[402] See First Interexchange Competition Order, 6 FCC Rcd at 5887-92.

considered other indicia of market conduct and performance, including price levels and trends in prices over time.

140. We believe that our analysis of these general market characteristics supports a finding that AT&T lacks market power in today's market for interstate, domestic, interexchange telecommunications services. This finding is also supported by evidence in the record concerning market conduct and performance, including levels in prices and trends in prices over time.

141. We conclude, in light of the fact that business, 800 and residential services constitute the vast majority of the interstate, domestic, interexchange services market, that the market-structure characteristics and the indicia of market conduct and performance all indicate that AT&T lacks market power in the relevant product and geographic market. Accordingly, we find that AT&T lacks market power in the interstate, domestic, interexchange telecommunications market.

142. We acknowledge that there is evidence in the record indicating that AT&T may have the ability to control prices with respect to certain narrow, specific services having de minimis revenues (specifically, 800 directory assistance and analog private line) when compared to total industry revenues. That does not mean, however, that AT&T has market power in the domestic, long-distance market as a whole. Moreover, we believe AT&T's voluntary commitments will effectively restrain AT&T's exercise of any market power it may have with respect to these narrow service segments. We similarly recognize that AT&T's proprietary calling card may have given AT&T an advantage in obtaining payphone presubscriptions. We conclude, however, that in light of AT&T's decreasing market share of operator services, and the substantial increase in the use of prepaid calling cards, any market power AT&T may possess in the operator services market will not materially affect its power to control prices in the overall interstate long-distance market. We likewise do not believe that the concerns raised about the possible effects on rate integration of reclassifying AT&T as non-dominant constitute evidence of AT&T's market power. As discussed above, our policy of rate integration will not be affected by our reclassification of AT&T. Finally, with respect to AT&T's possible market power with respect to resellers, we find that AT&T's small and shrinking market share constitutes persuasive evidence that AT&T lacks market power in this market segment. We further find that AT&T's activities with respect to resellers do not constitute persuasive evidence that AT&T has power to control prices in the overall interstate, long-distance market.

3. Other Arguments Raised As To Why AT&T Should Not Be Declared Non-Dominant

143. In this section, we address various arguments raised in the record that do not relate directly to the question of whether AT&T possesses market power, but rather concern possible effects of declaring AT&T non-dominant. More specifically, we address the following issues: (1) whether reclassifying AT&T will lead to geographic rate deaveraging;

(2) whether reclassifying AT&T will result in its anticompetitively bundling of CPE with long distance services; (3) whether the reclassification of AT&T must be done within the context of a rulemaking; and (4) whether the Commission should impose various conditions on AT&T before it reclassifies it as non-dominant. We conclude that none of the concerns articulated by the parties justifies the continued regulation of AT&T as a dominant carrier.

a. Geographic Rate Averaging

(1) Pleadings

144. LEC Joint Commenters assert that the Commission, in numerous orders, has stated that its tariff review process provides sufficient insurance that toll rates will be geographically averaged.[403] They note that the Commission has stated that "any [AT&T] filing that proposed geographically deaveraged rates would be subject to the full 90-day notice period . . . [b]ased on these safeguards, we do not believe that specific regulation requiring geographic toll rate averaging are necessary."[404] LEC Joint Commenters further argue that, because many AT&T discount plans are not offered ubiquitously, some rural areas are forced to pay the higher basic rate, while other customers can take advantage of the discount plans. This disparity, LEC Joint Commenters assert, amounts to geographic toll rate deaveraging.[405] Thus, LEC Joint Commenters urge the Commission to mandate geographic toll rate averaging, and to propose specific rules to enforce its policy in favor of geographic toll rate averaging in cases where carriers are entitled to streamlined tariff review.[406] LEC Joint Commenters further urge the Commission to ensure that AT&T's discount plans and promotions are offered to all customers in all geographic areas, regardless of AT&T's dominant status.[407]

145. LEC Joint Commenters maintain that the Commission should reaffirm its commitment to enforcing its fundamental policy against rate deaveraging, and should require nationwide availability of optional calling plans.[408] They further argue that the Commission should require AT&T to continue to serve rural areas without degrading service unless it obtains consent under Section 214, and that the Commission should adopt rules, where

[403] LEC Joint Commenters June 9, 1995 Comments at 6 (citing AT&T Price Cap Reconsideration Order, 6 FCC Rcd at 679.

[404] Id. at 6 n.4 (quoting AT&T Price Cap Reconsideration Order, 6 FCC Rcd at 679).

[405] Id. at 5.

[406] Id.

[407] Id.

[408] LEC Joint Commenters October 3, 1995 Ex Parte Letter at 2.

necessary to compensate for streamlining the tariff review process and relaxing other common carrier requirements, in conjunction with its decision on AT&T's request for reclassification as a non-dominant carrier.[409]

(2) Discussion

146. Although the Commission has never adopted specific regulations requiring geographic toll rate averaging, we have endorsed a strong policy favoring geographically averaged rates.[410] As LEC Joint Commenters note, the Commission has indicated it would closely scrutinize any AT&T tariffs that proposed to deaverage rates. LEC Joint Commenters are concerned that the one-day notice period that would apply to AT&T tariff filings if AT&T were declared non-dominant would be insufficient to prevent AT&T from placing geographically deaveraged toll rates into effect. We note, however, that AT&T has made certain voluntary commitments with respect to geographic rate averaging. Specifically, AT&T has committed to file any new tariffs that depart from its traditional approach to geographic averaging for interstate residential direct dial services (e.g., geographically specific tariffs) on five business days' notice, and to identify clearly such tariff transmittals as affecting this commitment.[411] This commitment will continue for three years, unless the Commission adopts rules addressing this issue for all carriers or there is a change in federal law addressing this issue.[412] As noted above, in the meantime, we intend to examine, in the proceeding to be initiated, this policy in light of changes in the interstate, domestic, interexchange market since the time that policy was originally established.

b. Bundling of Customer Premises Equipment

(1) Pleadings

147. MCI and IDCMA argue that, if AT&T is declared non-dominant, AT&T will bundle equipment with services in an anticompetitive manner.[413] These commenters argue that, if tariff regulation of AT&T is diminished, AT&T, in order to offset reduced

[409] Id.

[410] See AT&T Price Cap Order, 4 FCC Rcd at 3132-34; Interexchange Competition NPRM, 5 FCC Rcd at 2646, 2649; AT&T Price Cap Reconsideration Order, 6 FCC Rcd at 679.

[411] AT&T September 21, 1995 Ex Parte Letter at 2.

[412] Id.

[413] MCI November 12, 1993 Comments at 13-16; MCI December 3, 1993 Reply Comments at 2; IDCMA November 12, 1993 Comments at 6-7, 17-18; IDCMA June 9, 1995 Comments at 11.

interexchange service revenues, will have an incentive to tie CPE purchases to interexchange service purchases, and that this will exclude and disadvantage competing CPE suppliers.[414] IDCMA argues that AT&T has sought to "lock in" CPE sales by adopting a strategic pricing program.[415] IDCMA also contends that, because transmission service represents almost 80 percent of a customer's overall cost of establishing and maintaining a network, AT&T's ability to offer special discounts on transmission services gives customers an incentive to use AT&T as their system integrator.[416] IBM asserts the importance of maintaining nonstructural safeguards to protect the CPE and enhanced services marketplaces and expresses concern that, if AT&T is reclassified as a non-dominant carrier, these safeguards will no longer be imposed on AT&T.[417] Finally, MCI argues that, if AT&T is allowed to bundle equipment with interexchange services, it would be able to offer anticompetitively low prices to particular customers by discounting equipment prices to levels unavailable to other customers.[418]

148. AT&T responds that separate and distinct regulatory obligations, including Commission rules preventing bundling, will continue to apply to AT&T and to all other interexchange carriers even if AT&T is declared non-dominant. AT&T further asserts that these issues need not be addressed in the present proceeding as there is no basis for adopting additional rules that apply only to AT&T.[419]

(2) Discussion

149. We reject as inapposite the argument that reclassification of AT&T as a non-dominant carrier will enable it to bundle equipment with services in an anticompetitive manner. As AT&T notes, Commission rules preventing bundling of CPE and basic services will continue to apply to AT&T and to all other interexchange carriers even if AT&T is

[414] IDCMA November 12, 1993 Comments at 6-7, 17-18; IDCMA June 9, 1995 Comments at 11; MCI December 3, 1993 Reply Comments at 2.

[415] IDCMA June 9, 1995 Comments at 11.

[416] Id. at 12.

[417] IBM December 3, 1993 Reply Comments at 2-5.

[418] MCI December 3, 1993 Reply Comments at 2, 6-7.

[419] AT&T June 30, 1995 Reply Comments at 34-35.

declared non-dominant.[420] Thus, the argument has no bearing on the question of whether we should reclassify AT&T as a non-dominant carrier.

c. Procedural Issues

(1) Pleadings

150. CNS argues that, because AT&T was declared dominant in a rulemaking proceeding, and because other determinations of non-dominance have been done in rulemaking proceedings, the Commission therefore can only reclassify AT&T as a non-dominant carrier in a rulemaking proceeding. It also argues that this issue "is too important to be decided without the publication of notice in the Federal Register."[421] AT&T argues that this motion is not a request for rulemaking and only entails a declaratory ruling. AT&T also notes that it has not requested any rule changes that would require a rulemaking proceeding.[422] UTC urges the Commission to treat AT&T's motion as a petition for rulemaking and to initiate a full investigation. It claims that a full investigation may reveal: (1) whether there are any AT&T services that are not subject to competition for which regulation would be necessary; and (2) whether the foreseeable evolution of the interexchange market may alter existing competitive conditions, for example through mergers, such that reclassification of AT&T would not be appropriate.[423] API, however, argues that the Commission already possesses a sufficient record to resolve the issue of AT&T's regulatory status.[424] IDCMA requests that a two-year deregulatory moratorium be placed on AT&T if the Commission grants AT&T's motion, to allow the Commission to gather information about the marketplace and the impact of reclassifying AT&T in this market.[425] NYNEX adds that, if AT&T is classified as non-dominant for interexchange service, then the Commission should also declare that all other providers of long-distance

[420] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, Final Decision, 77 FCC 2d 384, 439-40 (1980) (Computer II), recon., 84 FCC 2d 50 (1980), further recon., 88 FCC 2d 572 (1981), aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 9389 (1983); see also 47 C.F.R. § 64.702.

[421] CNS November 12, 1993 Comments at 5-6.

[422] AT&T December 3, 1993 Reply Comments at 9, n.14.

[423] UTC November 12, 1993 Comments at 3-4.

[424] API December 3, 1993 Reply Comments at 5.

[425] IDCMA June 9, 1995 Comments at 18-20.

service are non-dominant and subject to streamlined regulation.[426] ACTA and Ad Hoc IXCs claim that the Commission may not relax its regulation of AT&T until it undertakes a cost-benefit analysis.[427] Finally, BellSouth claims that because AT&T is making certain voluntary commitments, it is not truly being reclassified as a non-dominant carrier, but as a "semi-dominant" carrier, subject to price regulation and tariff filing requirements somewhere between those applied to dominant and non-dominant carriers.[428] It thus argues that the Commission must institute a rulemaking if it wishes to create a new classification under which to regulate AT&T.[429]

(2) Discussion

151. This is not a rulemaking proceeding. Rather, AT&T's motion amounts to a request for a declaratory ruling that AT&T should no longer be classified as a dominant carrier within the Commission's existing rules and policies. The fact that we declared AT&T dominant in the rulemaking proceeding that established our generic Competitive Carrier rules and policies does not make that declaration a rule. First, it is not codified in our rules. Second, while portions of the First Report and Order are in the nature of uncodified rules, the decision to declare AT&T dominant was an application of the rules and policies adopted in the First Report and Order to a specific entity, AT&T. The declaration of dominance regarding AT&T was an adjudicative decision, not a rule of general applicability. In any event, we note that we have in fact received broad public comment on AT&T's request.[430] Thus, we reject UTC's call for a "full investigation" through a rulemaking proceeding, as we already have a full and adequate record before us.

152. We reject IDCMA's request that a two-year moratorium be placed on AT&T's reclassification. As previously discussed, we find, based on the record evidence, that AT&T lacks market power in the interstate, domestic, interexchange market. In addition, as previously discussed, AT&T has offered voluntary commitments that are intended to serve as "transitional" arrangements that will address concerns raised in the record about the short term. We believe these commitments may alleviate these concerns during this period of regulatory transition. More importantly, we intend to initiate a proceeding to consider

[426] NYNEX June 9, 1995 Comments at 2.

[427] ACTA November 12, 1993 Comments at 2; Ad Hoc IXCs November 12, 1993 Comments at 4.

[428] BellSouth October 5, 1995 Ex Parte Letter at 2-3.

[429] Id.

[430] Cf. Chisholm v. FCC, 538 F.2d 349, 365 (D.C. Cir. 1976), cert. denied, 429 U.S. 890 (1976) ("Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments").

whether, in light of our conclusion that no carrier is dominant in the domestic long-distance market, we need to modify our existing regulatory scheme for interexchange carriers.

153. We likewise reject the argument of ACTA and Ad Hoc IXCs that we cannot reclassify AT&T until we have completed a cost-benefit analysis. In this proceeding, we are simply considering whether AT&T still possesses market power in the domestic long-distance market; no cost-benefit analysis is required here, since that analysis was conducted in the Competitive Carrier orders.

154. In the Fifth Report and Order, the Commission stated that, if BOCs were allowed to provide long-distance services, "we would regulate the BOCs' interstate, interLATA services as dominant until we determine what degree of separation, if any, would be necessary for BOCs or their affiliates to qualify for nondominant regulation."[431] As BOCs are currently prohibited from providing long-distance services by the MFJ, we have made no determination about the degree of separation, if any, needed for BOCS and their affiliates to be declared non-dominant. This issue is beyond the scope of this proceeding and we therefore reject NYNEX's argument that, if AT&T is declared to be a non-dominant carrier, we should declare all providers of long-distance services to be non-dominant.

155. We also reject BellSouth's claim that AT&T's voluntary commitments create a "semi-dominant" carrier classification that can be created only via rulemaking. As stated above,[432] our conclusion that AT&T is non-dominant is not based upon the voluntary commitments offered by AT&T in its September 21, 1995 Ex Parte Letter (as clarified in its October 5, 1995 Ex Parte Letter), but on the economic information in this record regarding AT&T's position in the overall relevant market. The voluntary commitments assuage concerns raised in the record about the impact of AT&T's reclassification pending our further examination of the state of the interexchange market. AT&T's independent voluntary commitments do not, however, create a new carrier classification.

d. Miscellaneous Issues

(1) Pleadings

156. MCI argues that reclassification of AT&T as a non-dominant carrier should be subject to certain conditions. These conditions include: (1) "general availability" requirements, whereby each tariffed AT&T product must be available to users other than the customer for whom the offering was designed; (2) prohibitions on resale restrictions by AT&T; (3) a requirement that AT&T unbundle transmission services and equipment; (4) a prohibition against AT&T's use of patent rights to impede long-distance competition; and (5)

[431] Fifth Report and Order, 98 FCC 2d at 1198 n.23.

[432] See supra para. 37.

a requirement that AT&T obtain access services under the same terms and conditions as its competitors.[433]

157. CSE dismisses the claim that AT&T's actual or claimed ownership of patents could inhibit competition.[434] Assuming AT&T does hold patents in crucial equipment, CSE argues that there is a maximum amount customers are willing to pay for long-distance service produced using the patented equipment or process and that AT&T cannot use its control over patents to gain monopoly profits in excess of those associated with the patents themselves.[435]

158. MCI responds that AT&T has the power to extract license payments and thereby erect competitive barriers for its smaller competitors. MCI contends that because competitors cannot escape the cost burdens imposed, AT&T's ability to exercise patent rights so as to raise competitors' cost, amounts to de facto control in the affected market.[436]

159. IDCMA argues that, as a condition to deregulating AT&T, the Commission should: (1) require AT&T to comply with all regulations currently applicable to AT&T;[437] and (2) require AT&T to comply with all applicable nonstructural safeguards, such as network information disclosure, customer proprietary network information, cost allocation and affiliate transaction rules.[438] AT&T argues in response that the obligations IDCMA references "will apply, or not, irrespective of AT&T's classification so they do not raise any issues that need to be addressed here."[439]

[433] MCI November 12, 1993 Comments at 11-18; MCI June 30, 1995 Reply Comments at 1-2; see also Sprint December 3, 1993 Reply Comments at 3; Sprint June 30, 1995 Reply Comments at 3.

[434] CSE June 9, 1995 Comments at 7.

[435] Id. at 7-8.

[436] MCI June 30, 1995 Reply Comments at 7; see also Sprint June 9, 1995 Comments at 4.

[437] IDCMA June 9, 1995 Comments at 13.

[438] Id. at 16-17. IDCMA also claims that AT&T, by offering InterSpan Frame Relay service on a non-regulated basis, is violating current Commission regulations. Id. at 13-14.

[439] AT&T June 30, 1995 Reply Comments at 34-35.

(2) Discussion

160. We do not believe it necessary or desirable to impose the proposed conditions on AT&T. Reclassification of AT&T will have the effects described in paragraph 12 above. The existing Commission decisions and regulations that will continue to apply to a non-dominant AT&T (which include, inter alia, the referenced nonstructural safeguards), as well as the complaint and enforcement processes, are adequate to prevent AT&T from engaging in the kinds of practices that the proposed conditions are aimed at preventing. In addition, as AT&T states, the referenced currently applicable rules will continue to apply to a non-dominant AT&T, as will the Computer II requirements, including those regarding the unbundling of basic and enhanced services.[440] We also find no basis for concluding that AT&T patents should preclude us from finding AT&T non-dominant. Even assuming the validity of AT&T's patents, no party has shown that these patents have had or will have any material effect on the functioning of a competitive market.

e. RBOC Entry Into the Interexchange Market

(1) Pleadings

161. The Joint Bell Companies, CSE and Ameritech argue that the Commission should not grant AT&T's motion. Rather, they urge us to act on the RBOCs' rulemaking petition to allow RBOC entry into the long-distance market.[441] WilTel disagrees with the Joint Bell Companies' comments, arguing that the proper regulatory response to AT&T's motion is to allow local exchange carriers into the interexchange market.[442] WilTel argues that the Commission should instead preserve regulatory safeguards that have permitted competition to develop.[443] Sprint counters that the issues raised by the RBOCs are outside the scope of the instant proceeding and are irrelevant until the MFJ is revised.[444]

(2) Discussion

162. We agree with Sprint that the arguments made by the RBOCs are beyond the scope of this proceeding. Indeed, this Commission lacks the authority to address the RBOCs' request to enter the interstate long-distance market. Furthermore, the decision on

[440] See Computer II, 77 FCC 2d 384.

[441] Joint Bell Companies November 12, 1993 Comments at 2; CSE June 9, 1995 Comments at 11; Ameritech December 3, 1993 Reply Comments at 2.

[442] WilTel December 3, 1993 Reply Comments at 5.

[443] Id.

[444] Sprint June 30, 1995 Reply Comments at 4-5.